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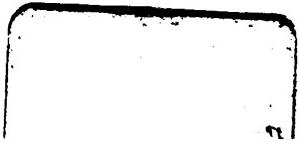
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INDIANA REPORTS.

VOLUME XLVI.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA.

WITH TABLES OF THE CASES REPORTED AND CASES CITED
AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XLVI.

CONTAINING CASES DECIDED AT THE MAY TERM, 1874.

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JUDGES

OF THE

SUPREME COURT OF JUDICATURE

DURING THE TIME OF THESE REPORTS.



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***Chief Justice at the May term, 1874.**

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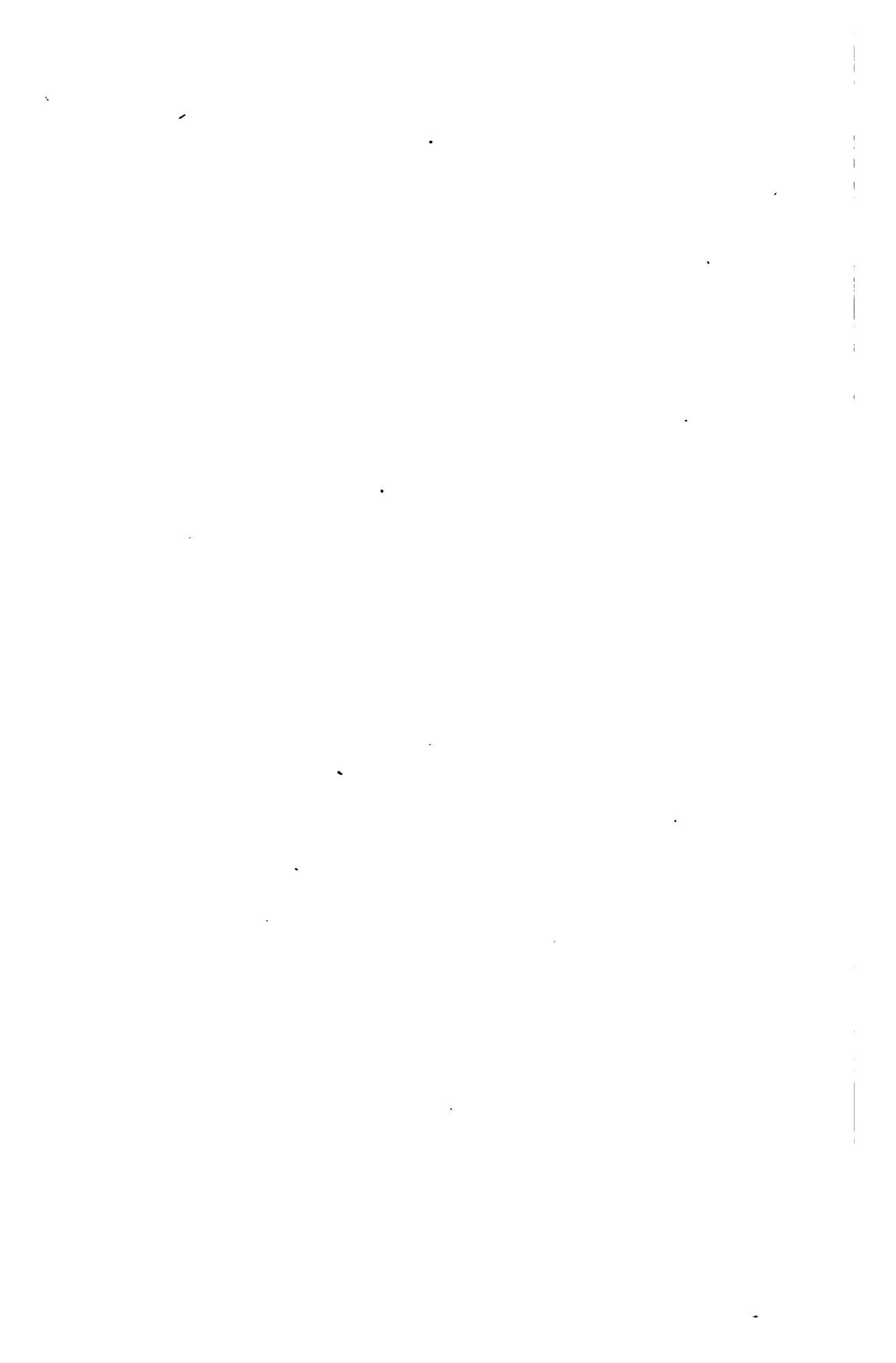
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3 Ind. Stat.

In *Linsman v. Huggins*, 44 Ind. 474, there should be the word *not* between
the words "was" and "necessary," in the fourteenth line from the bottom of
the page. The omission was made after the last proof reading.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1874, IN THE FIFTY-EIGHTH
YEAR OF THE STATE.

ROGERS *v.* ROGERS ET UX.

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NEW TRIAL.—Evidence.—A motion for a new trial on the ground of the admission of incompetent testimony must point out the particular evidence objected to. It is not sufficient to refer to it as the evidence shown by the bill of exceptions to have been objected to, especially when the bill of exceptions has not been filed.

SAME.—Conflicting Evidence.—The Supreme Court will not reverse a judgment on the weight of evidence, where the evidence is conflicting.

SAME.—Instructions.—One cause alleged for a new trial was, that the court gave erroneous instructions to the jury; another, that the jury disregarded the instructions of the court.

Held, that the objections were too general. The particular instructions objected to should have been pointed out.

Held, also, that the complaining party could not have been injured in consequence of the disregard by the jury of erroneous instructions.

SAME.—It is not error to refuse instructions proper in themselves, if the same matter is substantially embraced in other instructions given by the court.

WITNESS.—Married Woman.—In an action against husband and wife, where her property interests, as well as those of the husband, are involved, she is a competent witness in her own behalf, and her testimony for herself is not to be disregarded because it may incidentally benefit her husband.

Rogers *v.* Rogers *et ux.*

From the Madison Circuit Court.

M. S. Robinson and F. W. Lovett, for appellant.

F. A. Harrison and F. W. Sansberry, for appellees.

PETTIT, J.—The appellee Edward H. Rogers made a note to the appellant, Stephen H. Rogers, for seven thousand dollars, and the other appellee, Mary J. Rogers, wife of Edward H. Rogers, joined in a mortgage on certain lands, to secure the payment of the note, she in her own separate right owning part of the lands, and she and her husband jointly owning the other lands mortgaged.

The first and principal question is, was the note and mortgage given to secure and be assigned as collateral for a debt owing by the appellant and Edward H. Rogers, one of the appellees, to a third person? This question was, on two different trials by a jury, determined in the affirmative. On the last finding of the jury, the appellant moved for a new trial, for these reasons:

“ 1. The verdict of the jury in favor of the defendants, Edward H. and Mary J. Rogers, and against the defendant, Stephen Rogers, on his cross complaint, is not sustained by sufficient evidence.

“ 2. The verdict of the jury in favor of Edward H. and Mary J. Rogers, and against the defendant, Stephen Rogers, is contrary to law.

“ 3. The jury in finding for Edward H. and Mary J. Rogers, on the cross complaint of the defendant, Stephen H. Rogers, disregarded the instructions of the court.

“ 4. The court erred in admitting on the trial of said cause, over the objection of the defendant, Stephen H. Rogers, the testimony of Mary J. Rogers, the wife of the defendant Edward H. Rogers, which was excepted to at the time.

“ 5. The court erred in admitting, over the objection of the defendant, Stephen H. Rogers, other evidence on the part of Edward H. Rogers and Mary J. Rogers, as shown by the bill of exceptions herewith filed, and excepted to at the time.

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"6. The court erred in the instructions given to the jury, numbered 2, 6, 8, and 9, which were excepted to at the time by the said defendant, Stephen H. Rogers.

"7. The court erred in refusing to give instructions to the jury asked for by the defendant, Stephen H. Rogers, numbered 1, 2, and 3, which he excepted to at the time."

We dispose of the fifth cause for a new trial by saying that it does not point out what other evidence was improperly admitted; and, as to the bill of exceptions referred to, it was not filed for eighty-four days after the motion for a new trial was made, and overruled. We will not, therefore, further notice this cause, or reason, for a new trial.

The assignments of error are numerous in form, but there is but one in law, and that is for overruling the motion for a new trial; all others are mere causes, or reasons, for a new trial. We will proceed to consider the causes for a new trial properly pointed out.

As to the first cause, or reason, for a new trial, we have to say, that the evidence is long, all of which we have read and fully considered, as shown by the bill of exceptions. As it is presented to us, it is strongly and utterly conflicting, but we think it fully justifies and warrants the finding of the jury; hence, we cannot say that the verdict is not sustained by sufficient evidence.

As to the second reason for a new trial, we cannot see that the verdict is contrary to law.

This is a family quarrel; brothers, sisters, uncles, aunts, and cousins, swearing against each other, in which we have no interest but to find and decide the law between them, as the questions are presented to us.

As to the third reason for a new trial, which says that the jury disregarded the instructions of the court, but does not show in what particular, and as the sixth cause says that the court erred in giving instructions, we cannot see how the appellant was injured by the jury disregarding the instructions erroneously given against him.

As to the fourth cause for a new trial, we say that Mary

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J. Rogers was the owner in her own right of more than one-half of the lands mortgaged, and had a right under many decisions of this court to testify in her own behalf. It must be noticed, that it is not objected that her evidence was for her husband, but only to her right to testify as a witness. *Bennifield v. Hypres*, 38 Ind. 498.

The sixth cause for a new trial was for giving the second, sixth, eighth, and ninth instructions, which are as follows:

"No. 2. The original plaintiff, James Hill, has heretofore had a verdict returned in his favor for the sum of one thousand six hundred and twenty-two dollars and forty-eight cents, being the amount of the balance of the loan of three thousand six hundred and ninety-two dollars and fifty-four cents, made by said Hill to Stephen H. Rogers and Edward H. Rogers, on January 30th, 1869, and evidenced by two promissory notes, dated on that day and executed by said S. H. and E. H. Rogers; and said plaintiff has now no interest in the issues in this cause requiring your consideration, or a verdict at your hands. The questions now involved, and which you are to try and make a verdict upon, are the issues raised in the pleadings between Stephen H. Rogers and Edward H. Rogers, and Mary J. Rogers, his wife. Your first and principal inquiry then will be, what was the consideration of the seven-thousand-dollar note, and mortgage to secure it, described in the complaint of the plaintiff Hill, and admitted to have been made by the answers of Stephen H. Rogers and Edward H. Rogers, and Mary J. Rogers, his wife? The making of a promissory note for a sum of money, or the making of a mortgage, creates a legal presumption that there was a sufficient consideration for the making of such note or mortgage; but such legal presumption is not conclusive, and does not prevent the person who has made such note or mortgage from pleading and proving that the consideration for which the note or mortgage was made has wholly failed, or was insufficient at the time of the making of the note or mortgage to support it; but when the maker of the note or mortgage attempts to avoid it on account of

the failure or insufficiency of the consideration, he must show by a preponderance of the evidence in the cause, that the consideration has failed, or was insufficient to support such note or mortgage.

"In this cause, on the issues now before you between Stephen H. Rogers and Edward H. Rogers and his wife, Mary J. Rogers, the latter, viz., Edward H. and Mary J. Rogers, must prove, by a preponderance of all the evidence in the cause, that the note of seven thousand dollars, and the mortgage to secure it, executed by them, was made for the only purpose of being transferred by Stephen H. Rogers to James Hill, to secure Hill in the loan of three thousand six hundred and ninety-two dollars and fifty-four cents, loaned by Hill to S. H. and E. H. Rogers, and if they have proven by a preponderance of all the evidence given in the cause, that the only consideration for the note of seven thousand dollars, and the mortgage to secure it, was the money loaned by Hill, then you must find for the said Edward H. Rogers and Mary J. Rogers, his wife.

"No. 6. If you find, from the preponderance of the evidence, that Mary Jane executed the mortgage, with and under the understanding and agreement between her and Stephen Rogers at the time, that it was only to be used as collateral security for money about to be borrowed from James Hill by Stephen Rogers and her husband, and that it was given for no other consideration, as alleged by her in the second paragraph of her separate answer, then you must find for her.

"No. 8. In this cause, Stephen H. Rogers is a competent witness for himself, and Edward H. Rogers is a competent witness for himself, and Mary J. Rogers is a competent witness for herself; but Edward H. Rogers is not a competent witness for his wife, neither is Mary J. Rogers a competent witness for her husband, Edward H. Rogers. Admissions made by Edward H. Rogers are not evidence against his wife, and admissions made by Mary J. Rogers are not evidence against her husband; but the evidence given by

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Edward H. Rogers in his own behalf cannot be excluded from your consideration, if you believe his statements true, because they may incidentally benefit his wife; neither can the statements made by Mary J. Rogers in her behalf be excluded from your consideration, if you believe her statements true, merely because they may incidentally benefit her husband. Admissions made by Edward H. Rogers which tend to support the cross complaint of Stephen H. Rogers cannot be excluded from your consideration merely because they may incidentally affect the rights of Mary J. Rogers, his wife; neither can admissions made by Mary J. Rogers, which tend to support Stephen H. Rogers' cross complaint, be excluded because they may incidentally affect the rights of her husband, Edward H. Rogers." *Bennifield v. Hypres, supra.*

"No. 9. You are the exclusive judges of the credibility of all witnesses who have testified in this cause, and of the amount of credit to be given to the statements of each and every witness who has been introduced in this cause.

"If you meet with conflicts in the testimony, you should first endeavor to reconcile them, if you can so construe the evidence as to believe all the statements of all the witnesses; but if you cannot, then you are the exclusive judges of the credibility of each witness, and of the effect you will give to his statements; you are not bound to believe what a witness has said merely because he has sworn to it. In determining the credibility of a witness, you should consider his testimony, and see whether it is in itself contradictory, or contradicted by other creditable witnesses; whether the statements he makes are reasonable or unreasonable; whether they are consistent with each other, or the facts and circumstances established in the evidence before you; his manner of testifying, his cross-examination, the bias or prejudice he manifested while testifying in favor of the party introducing him; his willingness to testify for that party, or willingness to state any facts favorable to the opposite party; his interest in the event of the suit; compare his evidence with all the

other facts and circumstances in proof before you; his recollection, whether good or bad, clear or indistinct, concerning the fact he testified about; his opportunity of knowing the fact; the attention he gave it at the time; the relation any witness may sustain to the transaction about which they have testified; also the relation any witness may sustain to any party in interest in this suit, whether that of husband or wife of either party in interest, or a child of a party in interest; and whether or not any witness was of sufficient age at the time of the occurrence of the facts about which they have testified to comprehend and remember the facts they have narrated before you, from the date of their occurrence to the present time; and whether or not any witness has been under the influence of either party in interest so as to bias their statements while testifying; and from these considerations you should determine for yourselves what witness you will believe, and what disbelieve. That the greater number of witnesses testify to the same effect upon any controverted question, does not necessarily create a preponderance of evidence.

"A witness's testimony may, in itself considered, or when compared with other proven or admitted facts, be so unreasonable that very little, or even no weight at all can be given it."

Stephen H. Rogers, the appellant, who answered by cross complaint, asked the court to give the following instructions to the jury, to wit:

"1. The evidence of Mary J. Rogers, the wife of the defendant Edward H. Rogers, cannot be received as testimony for the benefit of her husband; and so far as the same goes to his benefit, her evidence must be disregarded by the jury. She can testify only in her own behalf, and as to matters affecting her separate property; and the evidence of the wife cannot be considered by the jury in determining the issues in favor of the husband.

"2. The evidence of Edward H. Rogers, the husband of the defendant Mary J. Rogers, cannot be received as testimony for the benefit of his wife; and so far as the same goes

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to her benefit, his evidence must be disregarded by the jury. He can testify only in his own behalf, and as to matters affecting him; and the evidence of the husband cannot be considered by the jury in determining the issues in favor of his wife.

"3. If the jury believe from the evidence, that the seven-thousand-dollar note and the mortgage was made to Stephen H. Rogers, to secure him in an indebtedness due to Stephen Rogers, to be determined by subsequent settlement, such was a consideration for said note and mortgage to the amount of such indebtedness; and if any indebtedness afterward accrued to Edward H. Rogers, on account of the sale of the farm to Stephen H. Rogers by Edward H. Rogers, such indebtedness as may have accrued on account of the sale of said farm, if after the making of said seven-thousand-dollar note and mortgage, cannot under the issues in this case be considered by the jury."

There was no error in giving instructions 2, 6, 8, and 9, above. They very clearly and explicitly express the law on the points of which they speak. Nor was there error in refusing to give instructions 1, 2, and 3, asked by the appellant. The first and second instructions asked and refused had been fully given in substance, and more properly in form, in instruction No. 6 above.

The third instruction asked is substantially covered by a part of the eighth instruction given, *supra*; but it is fully and clearly covered by the fifth instruction given, in these words:

"No. 5. If the jury find that the note and mortgage for seven thousand dollars were executed by Edward H. Rogers and wife to Stephen H. Rogers as evidence of indebtedness, or for a debt then owing to him, and to secure the payment of the same; any subsequent accruing indebtedness arising out of sale of farm, or set-off which may have been claimed by the defendant Edward H. Rogers, in his evidence, cannot be considered or allowed in this case, because not pleaded in the answer of Edward H. Rogers in this action."

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There is no error assigned for which the judgment should be reversed.

The judgment is affirmed, at the costs of the appellant.

DOWNEY, J., was absent on account of his having been consulted as counsel before his election.

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SHAFER ET AL. v. MORIARTY ET AL.

DITCHING ASSOCIATION.—Corporation.—Individual Liability.—Where a ditching association was organized under, though not in strict conformity to, the law therefor, by persons who had subscribed articles of association which contemplated the construction of a ditch upon which the plaintiff performed manual labor, such persons, having brought the company into existence and permitted it to exercise the functions of a corporation *de facto* under the law relative to such organizations, making the members individually liable for manual labor performed in constructing the ditches, could not deny the corporate existence of the company in an action to recover for such labor.

SAME.—Joint Liability.—Abatement.—The liability of the members of a ditching association for manual labor performed in the construction of a ditch contemplated by the articles of association is joint, and not several; and in an action to recover for such labor instituted against part only of the members, a verified answer alleging that other persons, who are named, living and within the jurisdiction of the court, are members of the company and signers of the articles of association, is good on demurrer.

SAME.—Primary Liability.—The liability of the members of a ditching association for manual labor performed is primary, and it is no defence to an action against the members to recover for such labor, that the uncollected assessments upon lands for benefits accruing thereto by the construction of the work are sufficient to pay the indebtedness.

From the Tipton Common Pleas.

C. N. Pollard, N. R. Overman, N. W. Parker, and F. T. Cox, for appellants.

F. Green and D. Waugh, for appellees.

OSBORN, J.—The appellees brought suit against the appellants as members of a ditching association, to recover for

Shafer *et al.* v. Moriarty *et al.*

débts contracted by the association for manual labor performed for the company.

The complaint shows, among other things, the performance of the work, and the rendition of a judgment against the company for the amount due; that an execution had been issued to the proper sheriff in the usual form to make the judgment, and the return thereof *nulla bona*; that the claim remained unpaid; that the appellants were members of the association, and sets out the articles showing that they were signed by the appellants and many others.

A demurrer was filed to the complaint, because it did not contain facts sufficient to constitute a cause of action, and,

2. Because there was a non-joinder of parties defendants.

The demurrer was overruled, and an exception was taken.

The appellants then answered. Two of them filed an answer of three paragraphs :

1. That the association was not a valid organization and corporation authorized to make contracts, by which the members could be made liable in their individual capacity; setting forth many reasons why they were not liable, in consequence of a failure to comply with the general law authorizing such organizations.

2. That other persons were members of the company and signers of the articles of association, and jointly liable with them, giving their names, and making the usual averments that they were alive and within the jurisdiction of the court.

3. The general denial.

The other appellants filed an answer in two paragraphs, similar in every respect to the second and third paragraphs above stated. The second paragraph in both answers was sworn to. Demurrs were filed to each of the special paragraphs of the answers, which were sustained, and exceptions taken. The cause was tried by the court, who found for the appellees, and, over a motion for a new trial, judgment was rendered on the finding and for costs.

The errors assigned call in question the liability of the appellants on account of the invalidity of the organization,

although all but two of the appellants admit that they are liable if the organization was not valid; second, also the character of the liability, whether it is joint or several; and, third, whether valid outstanding, uncollected assessments upon lands for benefits by the construction of the works mentioned in the articles of association, in amounts sufficient to pay the claim of the appellees, would avail the appellants as a defence to the action.

The appellants, with others, united in and signed articles of association for the construction of certain ditches and to drain certain wet and overflowed lands, under the general laws of the State. The articles were recorded in the recorder's office, and they became a corporation in fact, and as such became indebted to the appellees for manual labor performed for the company.

Sec. 16 of the act authorizing the formation of draining associations, 3 Ind. Stat. 227, is as follows: "All members of any company which has been organized, or which shall be organized under the provisions of this act, shall be personally liable for all debts contracted by the company for manual labor performed for the company." The company was organized under the provisions of the act, though not in strict conformity to it. After a company has contracted debts, as in this case, for the construction of a ditch contemplated by the articles of association, a member, whose name has been subscribed to the articles of association, ought not to be allowed to deny his liability because of a defect in the organization. Persons performing manual labor for the company cannot be expected to scrutinize the articles of association to determine whether they are prepared in strict compliance with the statute. The company has been organized under the provisions of law, that is, under a law for the organization of such companies, and for a purpose specified in the law. Laborers may well rely upon the persons whose names are signed to the articles as members, for pay for work done for the company. Having assisted in bringing the company into existence, and permitted it to exercise

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the functions of a corporation *de facto* under the law relative to such organizations, the subscribers cannot deny its existence in any action to recover for manual labor performed for the company.

Under a statute "that the members of the company shall be liable individually, in the same manner as carriers at common law, * * * and for all contracts which shall be made by such agents relating to the business of the corporation," it was held that the members of the corporation were liable to the same extent and in the same manner as if there was no act of incorporation; that an action brought against them should be against all the members, but that the non-joinder must be pleaded in abatement. *Allen v. Sewall*, 2 Wend. 327. SAVAGE, C. J., on page 338, says: "Individual liability in the act must be understood in contradistinction to corporate liability, and the defendants must therefore be held responsible to the same extent, and in the same manner as if there was no act of incorporation. The plaintiffs undoubtedly might have sued the corporation, but they had their election under the sixth section of the act to consider the association an unincorporated copartnership. It is true that the plaintiffs should have brought their suit against all the copartners, as this is an action *quasi ex contractu*; but this error of the plaintiffs can be taken advantage of only by plea in abatement."

In an act for incorporating a manufacturing company, it was provided that the persons and property of the members of the corporation should at all times be liable for all debts due by said corporation. It was held that the liability was joint, and not several. *Middletown Bank v. Magill*, 5 Conn. 28. HOSMER, C. J., on page 47, says: "It has been insisted, for the defendants, that the liability of the members is not joint, but several. I have heard no argument, nor am I capable of conceiving any, by which such a proposition can be supported. It is opposed to the words of the proviso, which clearly substitute certain members jointly to the legal obligation for the payment of debts,

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in place of the corporation. It equally contravenes the common law, which considers the liability for a single debt, contracted by several persons, as joint, and capable of enforcement against all the individuals." The rule would be different if the liability of the stockholder for the debt was in proportion to his stock and to its amount. In such a case, their liability would be subject to different rules. One might be liable for one amount and another for a different one according to the amount of stock held. A joint suit would be impracticable, as there could be no joint judgment. *The Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 472; *Garrison v. Howe*, 17 N. Y. 458. So when the act provides, that "any person having any demand against the corporation may sue any stockholder and recover the same." *Moss v. Oakley*, 2 Hill N. Y. 265.

The signers of articles of a ditching association, under the laws of this State, authorizing such organizations, become members of the company and thereby associate themselves together, under the corporate name assumed, for the purpose of draining, reclaiming, and protecting wet land, or such as may be liable to be overflowed. They become members of, but not stockholders in, the company. The company has no capital stock, and the law does not authorize it to issue any. Nor does it provide for a transfer of the interest of a member or his release from liability as such. It contemplates that the land benefited by the work will be charged with the payment of its cost, and provision is made for that purpose; but the section already quoted makes the members liable for the debts of the company for manual labor in the first instance. It is true that they are permitted to do the work and contract the debts in a corporate name, but they are declared to be liable personally for such debts, to the same extent as if the work was done and the debts contracted by them as partners. We conclude that they are liable jointly and not severally, and that the demurrers to the paragraphs setting up the non-joinder of the other members of the company were erroneously sustained.

Shafer et al. v. Moriarty et al.

Whether a member can withdraw from the association and thus escape liability for debts thereafter contracted, is not before us, and we express no opinion upon it.

Under the law, the members are primarily liable for debts of the character sued for in this action. The language is, "shall be liable for all debts contracted by the company for manual labor performed for the company." They are not guarantors, or collaterally liable, after the assets of the company are exhausted, as provided in section 38 of the general railroad law, 1 G. & H. 517, or as is sometimes provided after judgment against the company and the return of an execution of no property. *Harger v. McCullough*, 2 Denio, 119; *Corning v. McCullough*, 1 Comst. 47.

Of course, the liability depends entirely upon the statute. The creditors of a ditching association, on account of manual labor performed for the company, need not even sue the company before resorting to the members. They are not required to wait until the assets of the association are exhausted, or until its assessments for benefits upon land are collected. Undoubtedly the members paying any such debts would be entitled to be reimbursed out of the receipts when the assessments should be paid; but the creditor is not required to wait until they are collected. It follows that proof that uncollected assessments were outstanding would be no defence to an action against a member. *The Marion Township, etc., Co. v. Norris*, 37 Ind. 424.

The judgment is reversed, with costs; cause remanded, with instructions to overrule the demurrers to the paragraphs of the answers in abatement, and for further proceedings in accordance with this opinion.

Brooks *v.* Riding.

BROOKS *v.* RIDING.46 15
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VENDOR AND PURCHASER.—*False Representations.*—*Knowledge.*—Where a vendor, to induce the vendee to purchase a certain lot of ground, represented to him that the lot was the ground inclosed by a certain fence, which ground was examined by the vendee and had long been known to him; that the lot had a frontage of a certain number of feet on a street; when the fact, unknown to the vendor and vendee, was, that the fence inclosed five feet in width of a street and as many feet less than the frontage so represented by the vendor;

Held, that, in an action for the purchase money, the vendee might defend as to so much of the price as was agreed to be paid for the five feet in width of the street so inclosed.

STREETS.—*Adverse Possession.*—*Easements.*—The rights of the public in a street of a city cannot be impaired or destroyed by the inclosure and occupancy thereof, by fencing, by an adjoining land-owner claiming title thereto.

EVIDENCE.—*Admissions.*—Testimony of an admission by defendant, that he was willing to pay the claim sued on if he had not been sued on it, is inadmissible.

From the Allen Common Pleas.

J. A. Fay and L. M. Ninde, for appellant.

BUSKIRK, J.—The appellant brought this suit to foreclose a mortgage made by the appellee to secure divers notes, a balance of which was claimed by the appellant to be due.

The defendant answered payment, set-off, and a paragraph alleging fraudulent representations in the sale of the property, for the purchase-money of which the notes and mortgage were taken.

The controversy between the parties arose upon this last answer and the issue formed upon it. It alleges that Riding contracted for the purchase of a certain lot from Brooks for one thousand eight hundred and fifty dollars; that when they met to execute the papers Brooks represented to Riding that he had measured the lot and found that it contained fifty-five feet instead of fifty feet as the parties had supposed, and that he would not take less than two thousand dollars for it; that Riding, believing these representations and relying upon them, made the purchase at two thousand dollars, and executed the note sued on, with others, and the mort-

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gage, to secure the same ; that, in fact, the said lot was only fifty feet front ; that such representations were falsely, knowingly, and fraudulently made by the said Brooks, by means whereof the defendant was induced to agree to pay for such lot the additional sum of one hundred and fifty dollars.

Issues were formed upon the answer and submitted to a jury for trial and resulted in a verdict for the defendant. A motion for a new trial was overruled, and judgment was rendered accordingly.

The error assigned is the overruling of the motion for a new trial.

Several reasons are assigned by counsel for appellant why the verdict was not sustained by the evidence. The evidence is properly in the record. The defendant was sworn and examined as a witness and gave all the evidence he offered to sustain his plea of fraud. He stated that he had a negotiation for the lot with Brooks, when he agreed to take one thousand eight hundred and fifty dollars for it ; and that he went down the next day to see Brooks, and they went together to see the lot, and when they got there Brooks said it must be fifty-five feet front. He proceeds thus :

" I then stood by the front of the lot and Brooks stepped the lot, that is, across the front of it, and said it was fifty-five feet wide, and that it was worth more than one thousand eight hundred and fifty dollars ; that he would not take less than two thousand dollars for it. I said if it was fifty-five feet wide it was worth more than if it was only fifty feet, but I never knew how wide the lot was. * * He said when we were at the lot, it was fifty-five feet wide, and that if I would give him two thousand dollars I could have it. He did not say anything about measuring the lot."

The witness further testified that he had resided on the lot adjoining the one he purchased for twelve years prior to such purchase, and had seen it every day ; that it was fenced fifty-five feet wide, and had been ever since he knew it ; that he took possession of the lot just as it was fenced and held it until the city engineer told him the fence was

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on the street, when he moved it back ; and that the lot with fifty feet front was worth one hundred and fifty dollars less than it would have been with fifty-five feet front.

The further facts appeared, about which there was no controversy, that Brooks held the lot under the Ewings, who had owned and occupied it adversely for about thirty years previous to the sale to Riding ; that during all that time the strip of five feet in controversy had been fenced in as a part of said lot, and the possession thereof was passed from the Ewings to Brooks and from him to Riding as a part of the lot.

It is earnestly contended by counsel for appellant that the evidence wholly failed to establish any fraud on the part of Brooks, because there was no evidence showing or tending to show that he knew or had any reason to suspect that the five feet in controversy did not constitute part of the lot he sold. It is claimed that it lacked two essential elements of fraud, the *scienter* of Brooks and Riding's reliance upon the representations and his right to do so.

A reference is made to several adjudged cases holding that, to constitute fraud, the representations must have been not only false in fact, but must have been made knowing them to be false.

The question sought to be raised was decided by this court adversely to the appellant in the case of *Frenzel v. Miller*, 37 Ind. 1.

In that case, we held that "if the statement be in fact false, and be uttered for a fraudulent purpose, which is in fact accomplished, it has the whole effect of fraud in annulling the contract, although the person uttering the statement did not know it to be false, but believed it to be true ;" and that "he who sells property on a description given by himself, is bound to make good that description ; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must remain liable for that variance."

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It was further held in that case that a representation false in fact, although made by mistake, would entitle the party relying thereon, and who had been injured thereby, either to rescind the contract or maintain an action thereon to recover damages or to base a defence to an action brought to enforce the contract.

It very clearly appears from the evidence that Brooks represented that the lot was fifty-five feet wide; that Riding did not know the width of the lot, but made the purchase in reliance upon such representation. It is true that Riding examined the lot and saw it stepped and saw for himself that fifty-five feet were inclosed by the fence, but he did not know that five feet had been fenced which belonged to the public, and therefore had the right to rely upon the representation of Brooks that the lot contained fifty-five feet. The cases of *Port v. Williams*, 6 Ind. 219, and *Williams v. Port*, 9 Ind. 551, are not in point, because Riding could not tell from a personal examination that any portion of the street was inclosed by the fence, but relied upon the statement of Brooks that the lot contained fifty-five feet of frontage.

It is further insisted by counsel for appellant that the verdict was not supported by the evidence, because it showed that the five feet of ground in controversy belonged to Brooks and passed by his conveyance to Riding.

The following extract from the brief of counsel for appellant will show the position assumed and the argument offered in support of it. They say:

"The evidence shows an adverse possession in the plaintiff and those under whom he held for about thirty years. The dedication of a street to the public simply by filing a plat is incomplete and passes no title until the owner vests the possession in the public; that the public should be allowed to stand by thirty years without even claiming possession or the use of the street marked upon a plat while the ground is being improved or transferred from hand to hand, for value, all the time being held adversely, is a dangerous doctrine.

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"By the statute in force when the addition containing this lot was laid out, the recording of the plat operated as a warranty to the public of the land marked as a street for a public highway. R. S. 1831, p. 530. This title in the public is identical with the right the public has in the public highways through the country. The town or city being the agent of the public with the same duties over the street that supervisors have over highways. *Conner v. New Albany*, 1 Blackf. 43; S. C., 1 Blackf. 88. These rights may be lost by adverse possession or non-user as any other interest in real estate may, held by an individual. As the grant by recording the plat is in the nature of a warranty to the public, a mere non-user, if the owner of the land do not obstruct, may not create such an adverse possession as to cause the statute to run, but where the owner ousts the public and holds adversely, the statute runs the same whether the public easement is by grant or prescription." And in support of these positions reference is made to the following authorities: *Fewett v. Fewett*, 16 Barb. 150; *Smiles v. Hastings*, 24 Barb. 44; *White v. Crawford*, 10 Mass. 183; *Arnold v. Stevens*, 24 Pick. 106.

We have examined the above cases, and in our opinion they have no application to the present case. The first three cases cited involved the question of whether a right of way over the land of another created by deed was destroyed by non-user, and it was held that the doctrine of extinction by disuse only applied to rights created by use, and not to servitudes or easements created by deed. The question involved in the case last cited was, whether the occupation and cultivation of the surface of land by the owner for forty years would extinguish a right created by deed to dig ore in such land, and it was held that a mere neglect for forty years to exercise the right to dig ore, where it was created by deed, did not impair such right, and that the occupation and cultivation of such land by the owner was consistent with the right in a third person to dig ore, and that such possession was not adverse to the person who had the right to mine and dig ore in such land. All these cases relate to

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private easements created by deed, and can have no application to a case like the present, where the question is, whether the rights of the public in a street in a city can be impaired or destroyed by the non-user of the public of a part of such street and its use and occupation by an adjoining land-owner. In other words, whether the rights of a municipality or of the public may be lost by non-user, or adverse possession. The question is very fully considered by Dillon on Municipal Corporations. Sections 528 and 533 are as follows :

" Sec. 528. Concerning rights and remedies with respect to streets and public places, an interesting topic remains on which the cases are not agreed, and that is, whether the rights of the municipality or of the public may be lost by non-user, or adverse possession. There may be instances where the non-user has continued so long, and private rights have grown up of such a nature as to amount to an equitable estoppel, or an estoppel *in pais*, on the public, which the courts will enforce upon principles of justice ; but such cases are exceptional in their character, and it would perhaps be going too far to say that the courts have distinctly established such a principle. The state of the law, aside from statutory enactment, can best be exhibited by referring to the leading adjudications."

" Sec. 533. Upon consideration, it will, perhaps, appear that the following view is correct: Municipal corporations, as we have seen, have, in some respects, a double character —one public, the other, by way of distinction, private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no laches on its part or on that of its officers can defeat the right of the public thereto, yet there may grow up, in consequence, pri-

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vate rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found, that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine, that as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle.

"But there is no danger in recognizing the principle of an estoppel *in pais* as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require."

In the notes to sections 528 to 534 of Judge Dillon on Municipal Corporations, will be found a review of and reference to a large number of cases having a bearing upon the question under examination. We have examined the most of the cases cited and find that they fully support the principles enunciated by the learned author in the passages above quoted. We do not deem it necessary to cite such cases here, as we presume nearly every attorney has such work in his office.

The case of *Lane v. Kennedy*, 13 Ohio St. 42, is much in point in the present case. In that case, a street had been laid out and marked four rods wide, and had been opened and used a part of its width. The plaintiff placed his fence upon the part of the street which had not been opened and used by the public, and occupied that portion of the street inclosed by the fence for eighteen years. The defendant as supervisor removed the fence, and for this the plaintiff sued him in trespass. The plaintiff claimed that the public had lost its right to that portion of the street which he had inclosed and occupied, and that his right had become perfect and complete to such portion. The court draws with great clearness the distinction between an abandonment by

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the public of an entire street, and the occupation by a private individual of a portion of a street not used by the public. The court say:

"The question is one of much practical importance in this State. The capacities of its streets and public highways, whether prescribed by statute or established by the proprietors of towns or embryo cities, were fixed with regard to the future rather than the present exigencies of the communities in which they are located. At first, a mere trace would have sufficed for all the travel where, in process of time, an avenue is scarcely adequate to accommodate all who, for business or pleasure, may desire to traverse it.

"The public have a mere easement—a mere right of transit over it. And if the facilities are ample for the time, no one feels specially interested in seeing that the lines of the road have not been partially encroached upon by an adjoining proprietor, who, after all, owns the land subject to the easement. Public opinion would scarcely sustain a supervisor who should require the removal of a fence, which encroaches slightly upon the highway, if ample space is still left for all travellers.

"Unlike the case in 5 Ohio St. Rep. 594, there was nothing in the character of the improvement, which indicated an intention to permanently appropriate the land. It was a mere fence; and, as the bill of exceptions informs us, a worm fence and crooked at that. He carefully avoided inclosing any part of the road actually used by the public. He infringed no right which was then enjoyed or apparently desired. Nothing was done to excite the apprehension of the public or to call for its protest. We hear of no declarations, and all his acts were consistent with a temporary occupancy, by the permission or the mere sufferance of the public, till the land should be required for its use. In *Kirk v. Smith*, 9 Wheat. 288, MARSHALL, C. J., says, 'it would shock that sense of right, which must be felt equally by legislators and by judges, if a possession, which was permissive and

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entirely consistent with the title of another, should silently bar that title.'

"The circumstances do not show that the plaintiff, in placing his fence up to the travelled part of the street, thereby designed or intended to withhold the part enclosed from the public use, should it ever be required, and we are not at liberty to presume it. Fraud and intentional wrong are never presumed, but must be proved. Where the circumstances surrounding the possession, are entirely reconcilable with a continued recognition of the ultimate right of the public, the possession cannot well be said to be adverse in any just sense of that term.

"In *Fox v. Hart*, 11 Ohio, 414, it was held that a partial encroachment upon a travelled highway by an adjacent owner, though continued for eighteen years, did not work a forfeiture, as for *non user*, of the part so encroached upon, and that there was 'nothing to authorize the presumption, that any portion of it had been abandoned, or would not be opened, as soon as the public convenience should require.'

"It must be borne in mind that, in the case at bar, the road was not closed up and the public thereby excluded from any use of the street. In such case, the entire exclusion of the public would doubtless be such an ouster or disseizin as would require a suit to be brought within the statutory period, upon the principles settled in *Lessee of the City of Cincinnati v. The First Presbyterian Church*, 8 Ohio Rep. 298.

"Nor is it like the case of *The City of Cincinnati v. Evans*, 5 Ohio St. 594, where the purpose of the possession and intended permanency, were indicated by the erection within the bounds of the street, of the front of a large and costly warehouse. The erection of such a building, in such a place, was ample notice to the city authorities that he thereby intended a permanent appropriation to his private and individual benefit of a portion of the public easement, and called for immediate and effective measures upon their part, to pre-

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vent it. The case was, in this view of it, rightly determined; but as will be seen by a reference to the facts therein stated, it might with equal, if not greater propriety, have been placed upon the ground of an estoppel *in pais* on the part of the city authorities; the building having been located by the city surveyor and upon lines previously established and built upon."

Where the lines of a street have been practically established by the occupancy and improvements of the lots bordering upon it, and the city authorities have recognized the correctness of the lines so established by permitting the owners to so occupy and improve their property, and have acquiesced in it for a considerable length of time, and to such an extent that to change the lines would work great wrong to the owners and disturb long established lines and possession, the city or public authorities would undoubtedly be estopped from disturbing the lines so practically established, although an accurate survey should show that they were wrong according to the plat, and that the lots as occupied extended into the street as originally established. But it does not appear, in the case under examination, that the owners or occupants of any other lot on the line of the street, upon which the lot in question was situated, had extended it so as to occupy any portion of the street. It only appears that the city authorities had simply permitted the occupant of the lot in question to occupy a small portion of the street not then needed by the public.

In our opinion, the inclosure and occupation of the five feet of the street by Brooks and those under whom he claims did not destroy the rights of the public in such strip of ground and vest the title thereto in him or those through whom he derived his title.

We are also of opinion that the instructions asked by the appellant and refused by the court were correctly refused, as they involved the same propositions of law as those we have been considering.

We think the court committed no error in excluding the

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evidence complained of. The willingness of Riding to pay if he had not been sued did not deprive him of the right to set up a defence when he was sued. It does not appear from the record that any portion of the evidence of Mr. Minor was objected to and excluded. The exclusion of a question asked of this witness is assigned as a reason for a new trial, but the bill of exceptions does not show that any objection was made to any question asked of Minor, or that any of his evidence was excluded.

There is no error in the record.

The judgment is affirmed, with costs.

PETTIT, J., dissents.

HATHAWAY v. THE TOLEDO, WABASH, AND WESTERN RAILWAY COMPANY.

PLEADING.—*Negligence.*—*Answer.*—In an action to recover for an injury alleged to have been caused by the negligence of the defendant, the complaint must allege that the injury resulted without any negligence on the part of the plaintiff contributing thereto, and an answer alleging facts showing that the negligence of the plaintiff contributed to the injury, or facts showing that the injury was caused solely by the plaintiff's negligence, is sufficient on demurrer, though unnecessary where the general denial is pleaded.

NEGLIGENCE.—*Contributory Negligence.*—In all cases where ordinary negligence on the part of the defendant is sufficient to infer liability, it is a sufficient defence to show that there was contributory negligence on the part of the plaintiff.

SAME.—In such a case it is a sufficient defence to show that although the negligence of the defendant was a cause, and even the primary cause of the occurrence, yet the occurrence would not have happened without a certain degree of blamable negligence on the part of the plaintiff.

SAME.—*Infant Plaintiff.*—These rules apply where a child is the plaintiff, whether the fault is that of the child or the negligence of the person having the care of the child.

46	25
124	284
126	30
46	25
198	99
46	25
186	44
46	25
141	98
142	275
142	623
143	463
143	528
46	25
150	579
151	34
151	48
151	57
151	622
46	25
153	171

From the White Common Pleas.

Hathaway *v.* The Toledo, etc., R. W. Co.

B. B. Daily and L. B. Sims, for appellant.

W. Z. Stuart, for appellee.

DOWNEY, C. J.—This action was brought by the appellant against the appellee, to recover for an injury caused by a locomotive and freight train running over her, and so crushing one of her legs that it had to be amputated, etc. The injuries, it is alleged, were caused by the negligence and wilful misconduct of the agents and servants of the defendant in charge of the train. The action was commenced in Carroll county, but in consequence of a change of venue was tried in White county.

The defendant pleaded the general denial, and also two special paragraphs.

A demurrer to the special paragraphs was overruled by the court, and the plaintiff excepted. A trial by jury resulted in a general verdict for the defendant, and also the following special findings made at the request of the plaintiff:

"1. Did the defendant, on or about the 4th day of March, 1867, run her train of cars on the plaintiff's leg and thereby so crush and mangle the same that amputation thereof was necessary ?

"Answer. Yes.

"2. Did the defendant by her employees and servants use and exercise ordinary care in operating and running her train by which the plaintiff was injured as charged in her complaint ?

"Answer. No.

"3. Was the defendant guilty of negligence in the manner of running her train on the afternoon of the 4th of March, 1867, and did such negligence cause the injury to the plaintiff as alleged in her complaint ?

"Answer. No."

There is a conflict between the second and third of these special findings, as the second finds that the defendant did not by its servants exercise ordinary care in operating and running the train by which the plaintiff was injured, and the

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third finds that the defendant was not guilty of negligence in the manner of running the same train at the same time. If the company did not exercise ordinary care, it was guilty of negligence. It is not important, however, that this matter should be further noticed, as the case cannot turn upon it. The findings probably neutralize each other.

A motion made by the plaintiff for a new trial was overruled, there was an exception, and the evidence was put in the record by a bill of exceptions. Final judgment was rendered for the defendant.

In the assignment of errors, it is alleged that the court erred in the following particulars :

1. In overruling the plaintiff's demurrer to the second and third paragraphs of the answer ; and,

2. In overruling the plaintiff's motion for a new trial.

Other errors are alleged but they are embraced in that last named.

The second paragraph of the answer alleges facts showing that the negligence of the plaintiff contributed to the injury ; and the second avers that the injury was not merely contributed to, but was actually caused solely, by the plaintiff's own negligence. We think the paragraphs in question were sufficient, although they were, probably, unnecessary. It has been constantly held in this State, that in the declaration or complaint in such cases, it must be alleged that the injury resulted without any negligence contributing thereto on the part of the plaintiff. The general denial would, therefore, seem to involve this question without any special paragraphs such as were pleaded in this case.

The railroad runs east and west, or nearly so, through the city of Delphi, where the injury occurred, crossing Indiana street at a right angle. The father of the plaintiff lived in a house fronting east on Indiana street twenty or thirty yards north from the railroad crossing. The train consisted of a locomotive, tender, five freight cars, and a caboose, and was going east. The plaintiff was at the time a little over five years of age. Her father and mother were absent from

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their residence, and she had no attendant. As the train approached the crossing of Indiana street, on the day alluded to, at about four and a half o'clock in the afternoon, a number of school children, and among them a sister of the plaintiff, were approaching the crossing from the south, on the east side of Indiana street. The plaintiff came out of the gate at her father's house on the west side of that street, and started to cross the railroad, going in a south-east direction towards the point where the school children were. According to the testimony of most of the witnesses, she seemed not to notice or heed the approaching train, but passed rapidly to the crossing, and there received the injury complained of. Some of the witnesses for the plaintiff testified that no signals of the approaching train were given by the whistle or the bell, while those of the railroad company who testified swore that the usual signal was given by the ringing of the bell. The train was about the width of a square from the crossing when the plaintiff came out of her father's gate. When she first came out of the gate, she could not have seen the train, but she could have seen it from the time she got half way to the crossing. She was knocked down and the whole train passed over her. The train was stopped fifteen or twenty feet from where she lay. She was afterward carried to her father's house by some of the men on the train. Neither her father nor mother was at the house when she was carried into the house. The engineer testified that he saw some children on the right of the road, and could see that the road was clear as he approached the crossing; that at the crossing the fireman said to him there was something under the engine; that he stopped the train as soon as he could and got off, etc.

The fireman swore that they started out from the station and proceeded about twenty-five or thirty rods when he looked out and saw a little child on the north side of the track standing still, twenty or thirty feet from the track. Very soon after he saw the child, she started to run across the track ahead of the engine. She might have been the

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length of the engine ahead of it when he saw her, but he hardly thought she was. As soon as he saw her start to cross the track he spoke to the engineer to stop the train, and he immediately reversed the engine. Before it could be stopped it had struck the child and broken one of its legs. The conductor immediately got out, picked up the child, and took it into the house, etc.

It appears from the evidence that the engineer was at the south side of the cab, and could not see farther to the left than to the left or north side of the track.

One of the reasons for a new trial was, that the evidence was not sufficient to sustain the verdict of the jury. Another was, that the court erred in modifying certain charges asked by the plaintiff by adding the words, "where the negligence of the plaintiff did not contribute to such injury." Another was, that the court had misdirected the jury in the giving of the third, fourth, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, eighteenth, and twenty-first instructions asked by the defendant..

It is evident from the reference which has been made to the facts of the case, that we cannot reverse the judgment on the ground that the evidence is not sufficient to support the verdict. The judgment must be affirmed, if there is no other ground on which it should be reversed.

It is not necessary to set out all the instructions to dispose of the questions presented relating to them. The settlement of a few legal propositions will, when applied to them, dispose of this part of the case.

The first question is, to what extent is the appellant, the child, or its parents, chargeable with the consequences of contributory negligence by it or by them? In all cases where ordinary negligence is sufficient to infer liability, it is a sufficient defence to show that there was contributory negligence on the part of the plaintiff; that is to say, to show, that although the negligence of the defendant was a cause, and even the primary cause of the occurrence, yet the occurrence would not have happened without a certain degree of

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blamable negligence on the part of the plaintiff. Campbell Law of Negligence, sec. 81. To the same effect are numerous decisions of this court, many of which are collected in *The Toledo and Wabash Railway Co. v. Goddard*, 25 Ind. 185.

It seems harsh to apply this doctrine to a case where damage occurs to a child, and yet the application is made, and this whether the fault is that of the child itself or the negligence of the person under whose immediate care it is. Campbell Negligence, sec. 81. This doctrine is sanctioned by several decisions of this court. *The Pittsburgh, Fort Wayne, and Chicago R. W. Co. v. Vining's Adm'r*, 27 Ind. 513; *The Lafayette, etc., Railroad Co. v. Huffman*, 28 Ind. 287; *The Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind. 545. The modifications of the instructions asked by the plaintiff, and the instructions given by the court upon request of the defendant on the same subject, were in substantial conformity to the rule as laid down in the authorities to which we have referred, and hence, we must hold, not erroneous.

The court, at the request of the defendant, instructed the jury as follows: "When a person crossing a railroad track is injured by collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively, that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury." This instruction means no more, we think, than that in such cases it must be made to appear by the plaintiff that the injury occurred without blamable negligence on his part, before he can recover. Such, we think, is the law, as established by the authorities to which we have referred in another part of this opinion.

There is no other question in the case.

The judgment is affirmed, with costs.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

Fox v. The Allensville, Center Square, and Vevay Turnpike Co.

Fox v. THE ALLENSTVILLE, CENTER SQUARE, AND VEVAY TURNPIKE COMPANY.

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150 285

TURNPIKE.—Organization of Company.—Subscription of Stock.—It is not essential to the organization of a turnpike company, under the statute, that the whole amount of the capital stock as fixed by the articles of association shall be subscribed; it is sufficient if the stock subscribed amounts to five hundred dollars per mile of the proposed road.

SAME.—Residence of Stockholders.—It is not a valid objection to the organization of a turnpike company, that the residence of a few of the subscribers of stock to the articles of association is not stated, where the residence of a sufficient number, whose subscriptions amount to five hundred dollars per mile of the proposed road, is stated.

SAME.—Pleading.—Board of Directors.—Election of.—Under the statute requiring that "not less than three nor more than seven directors shall be elected by the stockholders" of a turnpike company, it is sufficient to aver, in a complaint on the subscription of stock, the fact that a board of directors was elected by the stockholders, without alleging the mode of election.

SAME.—Notice.—In an action by a turnpike company on the subscription of stock, though the giving of notice of the call for the payment of subscriptions is necessary before the action is commenced, and the giving of such notice must be averred in the complaint, yet the notice is not the foundation of the action and need not be made part of the complaint by copy.

SAME.—Time.—Publication of Notice.—Where notice of the time and place of payment of stock subscriptions to a turnpike company is required by statute to be given for thirty days by publication in a newspaper, it is sufficient, in an action on the subscription, to allege that such notice was given on the second day of March for payment to be made on the first day of April.

SAME.—Representations by Stock Solicitor.—It is no defence to an action on a subscription of stock to a turnpike company, that the person soliciting the defendant's subscription, appointed by those who had already subscribed and who afterward became members of the company upon its organization, represented that the road would be constructed in a certain manner, which has not been done.

SAME.—Evidence.—Calls.—Payment.—The entry in the record book of the board of directors of a turnpike company signed by the secretary is competent evidence of the act of the board requiring payment from subscribers to the capital stock; and although such entry may not specify any time when the payment shall be made, yet if it direct a call to be made for the payment and notice thereof to be published, the payment is thereby required as soon as notice specifying the time of payment can be given.

PRACTICE.—New Trial.—That the court erred in rejecting evidence, or that the court erred in admitting evidence, is too general a statement of a reason for a new trial.

Fox *v.* The Allensville, Center Square, and Vevay Turnpike Co.

From the Switzerland Circuit Court.

J. A. Works and *J. D. Works*, for appellant.

C. E. Walker and *W. R. Smith*, for appellee.

WORDEN, C. J.—This was an action by the appellee against the appellant upon his subscription to the capital stock of the company. The subscription sued upon was contained in the articles of association, which are set out and made a part of the complaint. The complaint contained such averments as show a due organization of the company.

Issue, trial, verdict and judgment for the plaintiff, a motion for a new trial being overruled, and exception taken.

There was a demurrer to the complaint for want of sufficient facts overruled, and exception. The defendant answered in four paragraphs, the first being the general denial, the other three being special. Demurrers for want of sufficient facts were sustained to the second, third, and fourth paragraphs of the answer, and the defendant excepted. These rulings on the demurrers are assigned for error.

The complaint is long and need not be set out in order to an understanding of the objections made to it.

The amount of the capital stock of the company, as fixed by the articles of association, is fifteen thousand dollars, and the whole amount does not appear to have been subscribed for. It is claimed that this is fatal to the existence of the corporation. The statute on the subject provides that the articles of association shall specify the amount of the capital stock and the number of shares into which it is divided, and that "whenever the stock subscribed amounts to the sum of five hundred dollars per mile of the proposed road, copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass, and shall from that time be a corporation, known by the name assumed in [its] articles of association." We are of opinion that under these statutory provisions, the whole amount of the capital stock, as fixed by the articles

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of association, need not be subscribed before the corporation can be brought into existence. The case of *Hoagland v. The Cincinnati and Fort Wayne Railroad Co.*, 18 Ind. 452, is in point. All that is necessary in this respect is, that there shall be subscriptions of stock to the amount of five hundred dollars per mile of the proposed road. This amount appears to have been subscribed.

It is also objected that the residence of some of the subscribers is not stated. The residence of a few of the subscribers is not stated, but without them there is more than enough subscribed to amount to the five hundred dollars per mile of the proposed road. This objection, therefore, is not valid. See *Busenback v. The Attica and Bethel Gravel Road Co.*, 43 Ind. 265.

It is further objected that the complaint does not show a valid election of directors of the corporation. It alleges, "that pursuant to said statute, a board of directors of said company was elected by the stockholders thereof, in all respects as required by said statute, which board of directors so elected were duly qualified, and entered upon the discharge of duty as such board of directors," etc. It is urged that this "does not show how the directors were elected, but pleads a mere conclusion, and not facts." The statute, in section 2, provides, that "not less than three nor more than seven directors shall be elected by the stockholders of every such corporation, who shall hold their office for one year and until their successors are in like manner elected," etc. In glancing through the statute, we do not discover that any provision is therein made as to the manner of electing directors, whether by ballot or *viva voce*. The allegations in the complaint are as explicit as the statute. We think the complaint sufficient. It alleges that the directors were elected by the stockholders. This is all the statute requires. The mode of conducting the election is not material, it being done by the proper persons. The words in the complaint "in all respects as required by said statute" may be stricken.

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out as surplusage, and then there will be no conclusion of law stated, but the simple averment of fact that the directors were elected by the stockholders. We need not inquire whether, in an action on a subscription for stock, advantage could be taken of an irregularity in the election of a board of directors.

It is next objected that the notice of the call for the payment of subscriptions is not made a part of the complaint. This, in our opinion, was not necessary. The notice of calls was not the foundation of the action, but the written subscription. To be sure, an action could not be maintained on the subscription until notice of the calls had been given as provided for in section 11 of the act above cited, but the notice is, nevertheless, not the foundation of the action, and need not be set out by copy. The complaint clearly avers the making of the call and the giving of notice thereof as required by the section above cited. The counsel for the appellant, in their brief, say, "there is no allegation that notice was given, for thirty days, of the time and place the subscribers were required to pay their subscriptions, nor is there anything in the complaint to show how often the notice was published, if more than once, a defect that we think must be fatal." We copy the complaint in respect to the giving of the notice: "That on the 2d day of March, 1872, plaintiff gave notice that all of said subscription was by order of the company due, and must be paid to the treasurer of said company, David Scott, at his residence in Jacksonville, Indiana, on or before the first day of April, 1872, by publishing the same in the Vevay Reveille, a newspaper printed in said county," etc.

The publication made on the 2d of March, for payment on the 1st of April, would, by adopting the ordinary rule of including one of the days and excluding the other, be a publication thirty days before the specified time of payment. We believe it is the settled practice in this State to serve process on Friday for the court sitting on the second succeeding Monday, and this is regarded as ten days' service

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before court. To make ten days, either the Friday or Monday must be counted. In the case before us, counting the day on which the notice was published, thirty days intervened before the 1st day of April, the time required by the statute. Upon looking into the statute on the subject of notice, section 11 above cited, we are of opinion that where notice is published in a newspaper, but one publication is required to be made, and this must be made thirty days before the specified time of payment.

We have thus considered the objections urged to the complaint. They are all, in our opinion, unfounded, and there was no error committed in overruling the demurrer thereto.

The second paragraph of the answer alleged that in the articles of association it was stipulated that the capital stock of the company should be fifteen thousand dollars; that the defendant, relying on the same, subscribed, etc.; that the company has never had a capital stock of more than three thousand dollars, and not enough to build the proposed road, etc. This paragraph is clearly bad, and the demurrer to it was correctly sustained. We deem it unnecessary to add any thing to what was said upon this point in considering the complaint.

In the third paragraph of his answer, the defendant alleged that he was induced to make his subscription by the solicitation of one John P. Bates, who was appointed by the original subscribers of the articles of association, and who are now members of the corporation, to procure stock subscriptions; that Bates, in order to procure the defendant to subscribe, falsely and fraudulently represented to him that the turnpike was to be constructed twelve feet wide, the stone to be one foot deep, and that there was to be an earth track made at the side of the same; whereas the road, so far as it has been constructed, has been made but nine feet wide, without any earth track at the side; and that the directors have ordered the road to be constructed but nine feet wide; that the defendant subscribed by reason of the false and fraudu-

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lent representations, relying on the same, and without which he would not have subscribed; wherefore, etc.

This paragraph of the answer was palpably bad, and the demurrer to it correctly sustained. At the time of the defendant's subscription, there was no corporation in existence to be bound by the representations of Bates or to be in any manner affected thereby, nor was he the agent of any corporation. Besides this, the representations were not such as the defendant had any right to rely upon. Neither the signers of the articles of association, nor any one representing them as their agents, could determine what should be the manner of constructing the road. Section 3 of the statute above cited provides, that "the directors may determine the particular manner of construction so as to secure and maintain a smooth and permanent road, the track of which shall be made either of plank, stone, gravel, or other hard material, or in such proportions of either as the directors may deem expedient, so that the same shall form a hard and even surface."

The directors being thus empowered to determine the manner of constructing the road, it is apparent that the defendant had no right to rely upon any representations as to the manner of construction, because he must have known that the particular manner represented might, or might not be adopted by the directors. The fourth paragraph was substantially like the third, and the demurrer thereto was correctly sustained.

We have passed upon all the questions arising upon the pleadings, and now proceed to consider the motion for a new trial.

The following were the reasons for a new trial:

- 1st. The finding of the jury is contrary to law.
- 2d. The verdict of the jury is contrary to the evidence.
- 3d. The court erred in ruling out testimony offered by defendant.
- 4th. The court erred in admitting testimony offered by the plaintiff and objected to by the defendant at the time.

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5th. The court erred in the charges given to the jury on his own motion.

The third and fourth reasons are too indefinite to raise any question. What testimony was admitted, or what rejected, is not stated or in any way pointed out. In relation to the fifth, it may be observed that the charges alluded to are not in the record. This leaves the first and second only to be considered, and they involve but one question, viz., whether the verdict is sustained by the evidence. We think it is. Indeed there is but one point in respect to which we have had any doubt. That point is in relation to the call made for payment of subscriptions. The statute provides, that "it shall be lawful for the directors to require payment from subscribers to the capital stock of the sums subscribed by them, at such times, and in such proportions, and on such conditions as they shall see fit," etc., "and they shall give notice of the payments thus required, and of the time and place, when and where, at least thirty days previous to the time when such payment is required to be made, in a newspaper printed in the county," etc.

The plaintiff read from her record book the following entry:

" February 24th, 1872.
" Center Square, Indiana.

"The Board of Directors of the Allensville, Center Square, and Vevay Turnpike Company met at the above named place, when it was ordered that a call be made for the full amount of subscription on the original subscription of said company; that said call be published in the Vevay Reveille.

"JAMES B. MORRISON, Sec'y."

Notice was accordingly published on the 2d of March, that the directors had required payment of the whole amount of subscriptions to the treasurer of the company, David Scott, at his residence in Jacksonville, Indiana, on or before the 1st day of April, 1872. This notice was signed by John Stewart, president, and J. B. Morrison, secretary.

It is objected that the entry from the record book is noth-

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ing more than the statement of the secretary that the call was made. We think, however, that the record purports to be a record of the acts of the directors, and that it shows the call to have been made by them. The call was for the whole amount of the subscriptions. This was doubtless within the power of the board of directors, as it was to make the call unconditional. The entry in the record of the call does not state when, or to whom, or where payment was required to be made. The statute does not require such statement except as to time. In giving notice, the time and place of payment must be specified. We think the order of the directors, making the call, contemplated payment as soon as the proper notice could be given, and they ordered the notice to be given. The notice having been given for the proper length of time, specifying the time and place of the required payment, we are of opinion that the proceedings were in substantial compliance with the statute.

The judgment below is affirmed, with costs.

46	38
194	498
46	38
142	60
46	38
144	643

HUSTON *v.* SCHINDLER.

ACTION.—Relief from Forged Instrument.—One whose name has been forged to a negotiable instrument may maintain an action against an indorsee of such instrument to compel a surrender of the forged instrument or a release therefrom; and in such action, the court may render a judgment releasing the person whose name is forged from all liability, and, as to him, declaring the instrument void.

EVIDENCE.—Comparison of Handwriting by Jury.—Papers having no connection with the cause, though conceded to be genuine, ought not to be submitted to the jury for comparison with the signature alleged to be forged.

SAME.—Comparison of Handwriting by Experts.—Such papers, together with the signature alleged to be forged, may be submitted to experts, for the purpose of comparison by them, and that they may give to the jury an opinion based upon such comparison.

SAME.—Forged Signature Submitted to Jury.—It is proper to submit to the

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jury, in connection with evidence bearing upon the genuineness of the signature in question, the paper bearing such controverted signature.

From the Wayne Common Pleas.

W. A. Peelle and H. Fox, for appellant.

W. A. Bickle and J. H. Popp, for appellee.

BUSKIRK, J.—The complaint, in its substantial allegations, alleges and charges, that on the 4th day of January, 1870, J. C. Fitzgerald and J. F. Burdge forged the name of the appellee to a certain note payable to themselves, one year after date, at the First National Bank of Centerville, Indiana, for the sum of four hundred dollars ; that said Fitzgerald and Burdge indorsed said note to the appellant, who was then in possession thereof, and claimed to own the same ; that at the time of the filing of the complaint, the appellant knew such note to be a forgery ; that the appellee had demanded of the appellant a surrender of such note, or a release from all liability thereon ; that the appellant had refused to surrender it or execute a release, but insisted on holding it as a valid subsisting obligation of said appellee ; that the resemblance between the handwriting of the appellee and the signature to the note was so very close that the forged signature might be taken by many persons, who had seen his handwriting, to be genuine, and that it would be very difficult to distinguish the one from the other ; and because of these facts, and the length of time the note had to run, and the uncertainty as to when the question of the genuineness of such note may be brought up at the instance of the appellant and settled, and the probability that at such time the appellee and his witnesses may be dead ; that he can explain and give reasons and point out differences between the forged and his genuine signature, which others cannot do ; wherefore, to prevent his estate from being exposed to injustice and wrong, he prays the court to decree a cancellation of said note, and delivery to him, or that he be decreed released from all liability thereon. A copy of such note and indorsements thereon was filed with and made a part thereof.

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A judgment by default was rendered against Fitzgerald and Burdge. The appellant appeared and demurred to the complaint for the want of sufficient facts, but the demurrer was overruled, and an exception taken. The appellant answered by the general denial and a special paragraph, in which he averred that the note was not a forgery ; that appellee's signature thereto was genuine ; and that he had purchased the same in good faith and for a valuable consideration.

The cause was submitted to a jury for trial, and resulted in a finding for appellee. New trial refused and judgment.

The appellant has assigned for error the overruling of the demurrer to the complaint, and the motion for a new trial.

The complaint in the present case is the same as the complaint in *Huston v. Roosa*, 43 Ind. 517, except that in that case it was charged that Fitzgerald had committed the forgery, while in the present case it is averred that the forgery was committed by Fitzgerald and Burdge. In that case, a demurrer was overruled to the complaint, and that ruling was assigned for error here. WORDEN, J., speaking for the court, after a careful examination of the authorities, reached the conclusion that the complaint was good, and entitled the plaintiff to the relief demanded and granted. We are entirely satisfied with the ruling in that case, and the grounds upon which it was placed. For the reasons there stated, we hold that the complaint in the present case is good, and that the court committed no error in ruling upon the demurrer thereto.

We next inquire whether the court erred in overruling the motion for a new trial. The evidence not being in the record, no question arises as to its sufficiency to sustain the verdict. The only reason relied upon for a new trial is presented by a bill of exceptions, which is as follows :

" Be it known, that on the trial of this cause in said court, and after the plaintiff, as a witness, had testified that the signature to the note in dispute was not made by him, or by any one under his direction ; that he never gave the note ;

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and after the said plaintiff had admitted that a number of signatures of his name, shown to him while on the witness stand, were genuine, were written by him; and after four witnesses who had been permitted to testify as experts had, upon comparison of the said admitted genuine signatures with the one alleged to be forged, testified that the same, the genuine ones and the one alleged to be forged, were in their opinion written by the same person; the defendant's counsel asked leave of the court to submit to the jury for their inspection the said forged signature and the said admitted genuine signatures, but the counsel for the plaintiff objected, and the objection was sustained, and the signatures were not permitted to be examined by the jury; to which ruling of the court the defendant, Huston, excepted, and files this his bill of exceptions, and asks that it be signed, sealed, and made a part of the record, which is done. JOHN F. KIBBEY."

It was held by this court, in *Chance v. The Indianapolis, etc., G. R. Co.*, 32 Ind. 472, that, "where other writings, admitted to be genuine, are already in the case, the jury may, with or without the aid of experts, make the comparison. But if they are not papers in the case, the evidence competent to go to the jury must be that of the witnesses, so as to afford the benefit of a cross-examination. The jury were permitted, over the objection of the defendant, to take with them in their retirement to consider of their verdict, the instrument sued on. This was erroneous."

In *Ellis v. The People*, 21 How. Pr. 356, the court say: "If they were properly before the jury, and Clarke be conceded to be eminently expert in determining upon the genuineness of signatures by inspection or comparison, the testimony offered was not allowable. It was an attempt to prove by comparison of hands; that is, by the juxtaposition of the two writings, that the three papers were written by the same person, and that, therefore, the signature to the receipt, the execution of which had been denied by the prosecutrix, was genuine. It is well settled that evidence of this character is inadmissible. *People v. Spooner*, 1 Den. 343;

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Jackson v. Phillips, 9 Cow. 94; *Wilson v. Kirkland*, 5 Hill N.Y. 182. The rule in this State and in England is, that when different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred by such comparison. *Van Wick v. McIntosh*, 4 Kern. 402; *Doe v. Newton*, 5 A. & E. 514. A witness cannot, however, take the place and usurp the functions of the jury."

In *Van Wyck v. McIntosh*, 14 N.Y. 439, the court say: "The evidence offered by the defendant of his bank checks was properly excluded. This offer obviously contemplated a comparison, by the jury, of the signatures to the checks with that indorsed upon the note, as one test of the genuineness of the latter. This has, I believe, never been allowed in this State. Our courts have adopted the English rule, which excludes such comparisons by the jury, as evidence to prove or disprove the handwriting of a party, and the opinions of witnesses founded thereon. *Wilson v. Kirkland*, 5 Hill N.Y. 182; *Jackson v. Phillips*, 9 Cow. 94; *Olmsted v. Stewart*, 13 Johns. 238; *Jackson v. Van Dusen*, 5 Johns. 155; *Tiford v. Knott*, 2 Johns. Cas. 211. A different rule prevails in several of our sister states. The true rule, I apprehend, on this subject, is that laid down in *Doe v. Newton*, 5 Adolph. & Ellis, 514, that where different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison. But other instruments or signatures cannot be introduced for that purpose."

The same rule is laid down in *Grieffs v. Ivery*, 11 A. & E. 322, and *Hughes v. Rogers*, 8 M. & W. 123.

It is very obvious from the foregoing authorities, that the ruling of the court below was correct. Papers having no connection with the cause, though conceded to be genuine, ought not to be submitted with the signature alleged to be forged to the jury for the purpose of comparison.

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The foregoing authorities go further, and hold that papers not properly in evidence for some other purpose, though admitted to be genuine, cannot be submitted to experts for the purpose of basing an opinion upon a comparison of the admitted genuine signatures with the one alleged to have been forged. A different rule, however, has been established in this court. Such comparison was held to be competent in *Chance v. The Indianapolis, etc., G. R. Co., supra*. The ruling in the above case was, upon thoughtful consideration and a full examination of the authorities, adhered to and followed in the case of *Burdick v. Hunt*, 43 Ind. 381.

The rule should, therefore, be regarded as settled in this State, that while papers not properly admitted for some other purpose may be submitted, where the signatures are admitted to be genuine, with the signature charged to have been forged, to experts for the purpose of comparison by them, and that they may give to the jury an opinion based upon such comparison, such papers cannot be submitted to the jury to enable them to make a comparison between the admitted genuine signatures and one alleged to be a forgery. It is proper to submit to the jury, in connection with the evidence bearing upon the genuineness of the signature in question, the paper bearing such controverted signature.

It was further held in *Burdick v. Hunt, supra*, that a paper, not already in evidence for some other purpose, could not be submitted to experts for comparison, where the signature was not admitted to be genuine, there being no dispute about its authenticity. If the rule were otherwise there would be a collateral issue formed as to the genuineness of the signature in question, before a comparison could be made by the experts.

In our opinion, the court below committed no error.

The judgment is affirmed, with costs.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

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134 219
46 44
142 166
46 44
164 83

THE UNION CENTRAL LIFE INSURANCE COMPANY ET AL. v. THOMAS.,

FOREIGN INSURANCE COMPANY.—Effect of Non-Compliance with Statute.—The prohibition against foreign insurance companies doing business in this State without compliance with the statute, extends to the company as well as to the agent of the company, and a contract evidenced by a policy issued without such compliance is invalid.

VOID CONTRACT.—Rescission.—Where a contract is void, the doctrine relating to the rescission of a contract, as to the time within which it may be rescinded, does not apply.

PRACTICE.—Admission of Evidence.—Where no ground of objection to evidence admitted has been pointed out to the court below, no question as to the admission of evidence can be considered by the Supreme Court.

FOREIGN INSURANCE COMPANY.—Principal and Agent.—Statements of Agent.—In an action against a foreign insurance company to recover money paid as a premium on a void policy, the declarations of the agent made after the transaction, stating that he was the agent of the defendant, that as such agent he had not, at the time the policy was issued, filed the certificate with the county auditor as required by the statute, but that afterward one was filed, and that he was the general agent of the company, and as such countersigned the policy, were inadmissible as evidence against the insurance company.

From the Cass Common Pleas.

J. C. Nelson and T. S. Rollins, for appellants.

J. M. Howard, for appellee.

DOWNEY, C. J.—This was an action by the appellee against the appellants, commenced April 15th, 1871. The complaint consisted of two paragraphs. The first was for money loaned, money paid, laid out, and expended, and money had and received. The second paragraph was to recover back an amount of money which had been paid by the plaintiff as the cash premium for a policy of life insurance from the company, through its agent, Gibson, who was made a defendant with the company. The ground of recovery relied upon was, that the company and its agent had not, when the policy was issued, complied with the first section of the act of December 21st, 1865, 3 Ind. Stat. 312, by furnishing to the Auditor of State the statement, obtaining the certificate of authority, and filing the same in the office of the clerk of the

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circuit court, as contemplated and required by the said section. The paragraph alleged an offer to return the policy, and a demand for the repayment of the money, before the commencement of the action. The policy bears date October 15th, 1870. A demurrer to the second paragraph of the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was filed by the defendants, overruled by the court, and an exception taken by the defendants.

The defendants answered by a general denial; the issue was tried by the court; there was a finding for the plaintiff as against the company, motion by the company for a new trial overruled, and final judgment for the plaintiff against the company, and in favor of Gibson, the other defendant, for costs.

The errors assigned are the overruling of the demurrer to the complaint, and the refusal to grant a new trial.

Two objections are urged to the second paragraph of the complaint; first, that the statute only regulates the conduct of insurance agents, and does not vitiate the policies issued; and, second, that the rescission was not in time. The first section of the statute provides, that it shall not be lawful for any agent or agents of any insurance company, incorporated by any other state than the State of Indiana, directly or indirectly, to take risks or transact any business of insurance in this State, without first producing a certificate of authority from the Auditor of State; and before obtaining such certificate, such agent or agents shall furnish the auditor with the statement required by that section of the act, under the oath of the president or secretary of the company. It is also required that the agent shall file the certificate so obtained by him, together with a certified copy of the statement on which it was obtained, in the office of the clerk of the circuit court of the county in which such agency is established, etc. It seems to us, that this statute evidently requires acts to be done by the company, as well as by the agent. The various matters required to be shown by the statement to be furnished to the auditor can only come from

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the books of the company, and the statement must be under the oath of the president or secretary of the company. We think the prohibition against doing business, unless the statute has been complied with, extends to the company as well as to the agents of the company ; and according to the general rule that contracts in violation of a statute are void, the contract evidenced by the policy so issued must be invalid. The case of *The Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520, upon a statute much like this, seems to be in point. In that case the contract of insurance was held void. And see *Washington Co. Mutual Ins. Co. v. Hastings*, 2 Allen, 398; *Williams v. Cheney*, 8 Gray, 206; *Jones v. Smith*, 3 Gray, 500; *Etna Ins. Co. v. Harvey*, 11 Wis. 394. The party paying the money is not so far *particeps criminis* as to prevent him from recovering back the money paid. *Deming v. The State*, 23 Ind. 416; *New England, etc., Ins. Co. v. Robinson*, 25 Ind. 536.

As the contract was void, we do not see any place for the doctrine relating to the rescission of contracts.

Several questions are presented, arising under the assignment of errors relating to the overruling of the motion for a new trial. We will not consider them in the order in which they are made in the motion.

The defendants objected to the introduction in evidence of the policy of insurance ; and the ground of objection, as stated in the brief, is, that although it is referred to in the complaint and professedly made a part of it, the action is not founded on it, and it was not therefore admissible, without proof of its execution. Had this objection been urged in the common pleas, it is possible that it would have prevailed ; but the bill of exceptions does not show that any objection to its being read in evidence was made, in which the ground of objection was stated. This will, we presume, be received as a sufficient reason why this objection cannot prevail.

A witness for the plaintiff, being one of his attorneys, testified to a conversation with the defendant, Andrew J. Gib-

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son, in which Gibson said he was the agent of the insurance company; that he tendered to Gibson the policy, and demanded of him the amount of money which Thomas, the plaintiff, had paid to him for the company, two hundred and forty dollars and fifty cents; that he refused to receive the policy, and refused to pay the money; that Gibson stated also that he, as agent of the company, had filed no certificate of the Auditor of State in Carroll county, as required by law, at the time the policy was issued; that Gibson stated, that afterward there was one filed; that he stated further, that he was the general agent of the company, and as such had countersigned the policy; that he understood him to say he had sent the money to the company, at Cincinnati; and that this conversation occurred a few days before this suit was commenced.

The insurance company objected to the proof of the statement of Gibson that he was the agent of the company; also, to proof that he stated that he had filed no certificate of the Auditor of State in the clerk's office; also, to evidence of his statement that he had countersigned the policy; on the ground that the same was hearsay, and inadmissible. The company also moved the court to strike out all the evidence of the statements of Gibson. The objection and motion were both overruled.

It is not easy to see why Gibson, the alleged agent, was made a defendant in the action, since the witness who testified that he said he had paid the money over to his principal was one of the plaintiff's attorneys, and knew that fact before the action was brought. The question presented is, was the evidence of the statements of Gibson, to which the company objected, admissible against the company? We think it was not admissible as evidence against the company. Whatever the agent does, in the lawful prosecution of the business of the agency, is the act of the principal whom he represents; and where the acts of the agent are admissible, his declarations and admissions respecting the subject-matter will also bind the principal, if they are made at the time,

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and constitute part of the transaction. The party's own admissions, whenever made, may be given in evidence against him ; but the admissions or declarations of his agent bind him only when made in regard to a transaction then pending, and, as the writers say, *dum fervet opus.* 1 Greenleaf Ev., sec. 113.

It is quite clear to us, that the declarations of Gibson, conceding that he was the agent of the company, to which objection was made, were inadmissible against the company. It would be a strange rule of evidence which would allow the declarations of an alleged agent to be received in proof of the agency. The other declarations related to matters which had long since passed, and not to a matter then depending. There was no joint or other interest between Gibson and the company, which could make his declarations admissible against the company. He seems to have been a man of straw, introduced, possibly, with a view to the use of his admissions as evidence in the case.

The judgment is reversed, with costs, and the cause remanded.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

PATTERSON *v.* DALLAS.

EVIDENCE.—*Record of Deed.*—A record of a deed is proper evidence, and neither the original nor a certified copy thereof is required.

From the Vermillion Circuit Court.

J. P. Baird, C. Crift, J. M. Allen, W. Mack, and C. T. Burton, for appellant

W. Eggleston, for appellee.

DOWNEY, J.—The only question in this case is presented in the brief of counsel for the appellant as follows :

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"This was an action brought by Dallas against Patterson to recover the purchase-money for one hundred and sixty acres of land, alleged to have been conveyed by Dallas to Patterson. Various answers were filed, but the main question in the case, as presented by the bill of exceptions, is, whether the plaintiff could introduce the deed record to prove the conveyance from Dallas to Patterson. The court, over the appellant's objection, without accounting for the original deed, permitted this to be done. We insist this was error, for the reason that the record was not admissible in evidence. Sec. 31 of the act concerning real property and the alienation thereof, 1 G. H. 265, authorized the admission of the record, but this section was expressly repealed by the act of May 4th, 1869, 3 Ind. Stat. 136," etc.

The point has already been ruled against the position assumed by counsel. *Bowers v. Van Winkle*, 41 Ind. 432; *Winship v. Clendenning*, 24 Ind. 439. The section on which the question was decided in the above named cases has not been repealed.

The judgment is affirmed, with five per cent. damages and costs.

BELL ET AL. V. TANGUY ET AL.

NEW TRIAL.—Surprise.—It is not sufficient cause for granting a new trial on motion of the defendant on the ground of surprise, that the attorney for defendant, by reason of necessary work to be done in completing his dwelling-house and his supposition that the cause would not be called for trial, neglected to attend the trial, and that on the trial, in the absence of the defendant, testimony was given that a horse, the value of which was in question, was worth more than he was really worth.

MISTAKE.—Delivery Bond.—Reformation of.—In an action on a delivery bond, where the bond is made payable to the constable who has levied the execu-

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tion, instead of to the execution plaintiff, and the bond shows that the execution was levied in favor of the plaintiff, the mistake, as a clerical error, may be corrected, and the bond reformed by making the execution plaintiff the obligee thereof.

From the Cass Circuit Court.

D. B. McConnell, for appellants.

M. Winfield, for appellees.

PETTIT, J.—This suit was brought before the mayor of the city of Logansport, having the same jurisdiction and practice as a justice of the peace, by the appellees, Samuel L. Tanguy and Henry Barnheisel, against the appellants, William Bell and Amos W. Mobley, and Mary A. Herbert and Benedict Herbert. The two latter were not served with process. The suit was on a delivery bond executed by the appellants and Herbert and Herbert to a constable for the delivery of a horse which he had levied on by virtue of an execution in his hands, issued on a judgment in favor of the appellees and against Mary A. Herbert. Proper issues were formed between the parties in court, and on the trial before the mayor there was judgment for the defendants for costs. On appeal it was tried by the judge without a jury, and resulted in a finding and judgment for the plaintiffs (appellees here) for fifty-five dollars. The only error assigned is the overruling of the motion for a new trial. The causes for a new trial were,

" 1st. The defendants say that they were surprised by the early calling of said cause, and that certain circumstances beyond their control, and which no ordinary prudence would have required them to neglect, prevented them from presenting their defence, which was a good one, upon said trial; and further, that they were surprised by the testimony of the witness, McSheppy, as to the value of said horse, he having been appraised, and no estimate ever placing his value above twenty-five dollars.

" 2d. The damages are excessive.

" 3d. The court erred in the amount of recovery, making the same much too large.

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"4th. The finding is not sustained by sufficient evidence.
"5th. The finding is contrary to law."

This motion was overruled, and exception taken. In support of the first cause for a new trial, the following affidavits were filed:

"Dyer B. McConnell swears that he is the attorney for the defendants Bell and Mobley, in the above entitled cause; that he was detained from court during the first week of the present term, by certain repairs to his dwelling-house, which he began before the term, in time, as he thought, to have completed them before the commencing of said term; that his said work was delayed by the rains of Friday and Saturday, the 16th and 17th inst., when his house was in a condition which rendered it uninhabitable when the term commenced; that he was unable to procure sufficient hands to do said work, and was compelled to work at the same himself; that upon the day upon which said cause was tried, his said house was in such a condition as to require his diligent labor until the hour of eleven o'clock at night, to close the same up, so that his property would be in some degree safe.

"Affiant further says, that said cause was numbered eighty-five on the civil docket, and he relied in full confidence upon the usual course of first disposing of the state docket, which contained thirty-three causes, a much larger number than usual, to make it impossible to reach said cause during the first, or even the second week of said term.

"Affiant further says, that the said defendants have a good defence in said cause; that they can prove that the horse was brought in and placed at the disposal of the said Branning on the day mentioned in the bond, and that immediately upon receiving notice that the horse was in town, he, the said Branning, absented himself, so that he could not be found, although he was diligently sought for by the defendants, and by this affiant; that the affiant was the attorney for the defendant Mary A. Herbert, at the time said bond was executed; that the same was not intended for a stat-

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utory delivery bond, but for an indemnifying bond to protect the said Branning against loss by reason of his permitting the said Mary A. Herbert and her husband to take the horse seized to their house in Fulton county; that the reason for this was, the said Mary A. Herbert claimed that the horse did not belong to her, but to the children of James H. Buntain, deceased, of whom she was then guardian, and she intended to claim said horse for them as guardian, and commence an action to try the right of property to the same as such; that the giving of said bond was a mere temporary arrangement; that the said Branning submitted the said bond to his attorney Maurice Winfield, Esq., and to James M. Howard, Esq.; that the only change suggested by his attorney, Winfield, was, that the horse should be appraised, and the bond should show it. I am informed, and it was in testimony on a former trial of this cause, that James M. Howard, Esq., advised the said Branning that said bond was not, in form, a statutory delivery bond, but was a sufficient bond to indemnify him, Branning, against loss in giving up the horse to the said Mary A. Herbert. The said horse was brought in and kept to be delivered up to the said Branning, for some hours, and subsequently the horse was again brought in and tendered to the said Branning, and was by him refused absolutely. Affiant further says that he saw said horse repeatedly, and thinks he knows his value; that he was little, old, and crippled, and that he does not place his value above fifteen dollars; that said horse was not then worth more than that amount, and as affiant has been informed and believes, died within six months after the date of the execution of the bond sued upon, of old age."

"William Bell, being duly sworn, declares and says that he knew the horse for which the bond was given to Ferdinand Branning by Mrs. Mary A. Herbert, Benedict Herbert, Amos W. Mobley, and William Bell, and upon which suit was brought by Tanguy and Barnheisel against the makers of said bond, in which the said horse is described as 'one

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dun horse,' and that said horse was old, and not worth to exceed the sum of fifteen dollars. Affiant further says that to his certain knowledge, the said horse was in the city of Logansport for delivery to the said Branning upon the day mentioned in said bond, and tied in the alley south of the court-house from the hour of eleven o'clock, A. M., to three o'clock, P. M., of said day, within full view of Fourth street, and that in his presence and that of D. B. McConnell, the said Branning was notified by Benedict Herbert, husband of the said Mary A. Herbert, that the horse was there, and that the horse was brought to town for the purpose of complying with the conditions of said bond; that after notifying him (Branning) as above, he (Branning) went away, and although he was diligently sought for by himself and the said Benedict Herbert, for the purpose of complying with the conditions of said bond, he could not be found by them; and that as suit had been instituted by the said Mary A. Herbert, as guardian of the minor heirs of James H. Buntain, deceased, to try the right of property to the said horse, which would of necessity stay all proceedings for the sale of said horse upon the execution by virtue of which the said Branning held him, and as said Mary A. Herbert, guardian, was ready to execute a bond to obtain possession of said horse, and as she, the said Mary A. Herbert, was then reported to be sick, at the point of death, he, the said Benedict Herbert, by and with the consent and advice of the securities of the said Mary A. Herbert on said bond, after the hour of three o'clock in the afternoon of said day, started for his home in Fulton county, taking said horse along with him."

We do not think these affidavits make out a cause for a new trial, under the third clause of sec. 352, 2 G. & H. 211. The neglect of an attorney to attend to his duty, or that a witness swore that a horse was worth more than he was really worth, cannot be a surprise such as to justify granting a new trial under the clause of the statute above cited.

The record shows that the parties were present at the

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trial, in these words: "Come now the parties, and the issues being joined, a jury is waived and the same is now submitted to the court for trial, and the court after hearing the evidence finds for the plaintiff," etc.

As to the second, third, and fourth causes, we have only to say that the damages are not excessive, and that the court did not err in the amount of the recovery, and that the finding is sustained by the evidence. The evidence shows that the horse was worth fifty dollars, and the law requires that the judgment in such case shall be for the value of the property, if it does not exceed the amount due on the execution, and ten per cent. damages, hence the finding and judgment for fifty-five dollars was proper. The fifth cause for a new trial is, that "the finding is contrary to law."

Under this cause, it is urged that as the delivery bond was in form made to the constable, Branning, no recovery can be had on it by the appellees, who were plaintiffs in the judgment, on which the execution issued. The condition of the bond shows that the execution levied on the horse was in favor of the plaintiffs. The complaint shows this mistake, and shows that it was so written, being a clerical error by the draftsman, and asks to reform the bond, and that the plaintiffs were the proper and legal payees of the bond. This was allowed and was clearly right. 2 G. & H. 333, sec. 790. There is no error in the record, and as the transcript was filed July 13th, 1872, and not submitted till November 26th, 1873, and then by appellees on the default of appellants, we think the case is here for delay merely, and not to correct any error of the court below, and we feel it to be our duty to add a per cent. to the judgment.

The judgment is affirmed, at the costs of the appellants, with ten per cent. damages.

MOYER *v.* BROWN.

APPEAL.—Evidence.—Where the evidence in the lower court is conflicting, the Supreme Court will not reverse the judgment on the weight of evidence.

From the Noble Common Pleas.

A. A. Chapin, for appellant.

PETTIT, J.—This suit was brought by the appellant against Sarah J. Brown and James H. Brown, her husband, for the replevin of personal property. There was a default as to both of the defendants. Afterward, the default as to Sarah J. Brown, the appellee, was set aside, and she answered,

1. General denial.
2. Property in herself.

Reply of general denial.

We suppose this reply was meant to apply to the second paragraph of the answer, as the general denial, under our practice, requires no reply; but it does not so state. There is no further notice taken of James H. Brown, except as he is named and referred to in the evidence, nor is there any judgment rendered for or against him; hence his name should not appear in the assignment of errors.

The only question raised for our consideration, either on the motion for a new trial or the assignment of error, is as to the sufficiency of the evidence to sustain the finding.

The case was tried by the court below, who saw and heard all the witnesses, their readiness or hesitancy to answer, while we can only see their evidence on paper; and while we say and admit that, as it appears to us, we might not have found as the court below did, we cannot, under numerous decisions of this court, reverse the finding and judgment. A finding and judgment might have been warranted either way; but there is one strong reason why the court below found for the appellee, and that is, that the plaintiff below and appellant here was a clerk in a bank and knew that the husband was not worth a cent in money, and that she, his wife, in her own right, had deposited in the

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bank, of which he was a clerk, large sums of money, and was the sole owner of all the property of them both.

The judgment is affirmed, at the costs of the appellant.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

PRUITT *v.* BROCKMAN ET UX.

EVIDENCE.—*Cross-Examination.*—Where a witness upon examination in chief had testified that he had never done a certain act, it was error to refuse, on cross-examination, to allow the witness to answer the question whether at a certain time and place he did not state to a person named that he had done said act.

From the Shelby Circuit Court.

T. W. Woollen, C. Byfield, S. Major, A. Major, B. F. Davis, and B. F. Love, for appellant.

PETTIT, J.—This suit was brought by the appellees, Oswell N. Brockman and Rebecca Brockman, his wife, against the appellant, Moses Pruitt. The action was for slander in calling Mrs. B. a whore, and repeating the words and charge in various vulgar forms.

There was an answer of general denial, with an agreement that all evidence might be given under it that would be proper or could be given under any answer that could be properly filed or issue made. There was a trial by jury, verdict for plaintiffs, motion for new trial overruled, and judgment on the verdict.

The only legally assigned error is the overruling of the motion for a new trial; there are others in form, but they are only reasons or causes for a new trial.

The motion and causes for a new trial are these:

“Comes now the defendant and moves the court for a new trial herein, and for grounds of motion:

- " 1. The damages assessed by the jury are excessive.
- " 2. The verdict of the jury is contrary to law, not sustained by, and is contrary to, the evidence.
- " 3. The verdict of the jury is contrary to law.
- " 4. Error of law occurring at the trial and excepted to at the time by the defendant, in this: 1. The court erred in refusing to permit the defendant to ask the witness, Isaac Beason, when upon the witness stand, if he had not stated to divers persons at divers times and places (and which persons and times and places were properly designated to lay the foundation for his impeachment), that he had had sexual intercourse with the plaintiff Rebecca Brockman, on many occasions; said witness having stated in his examination in chief that he never had sexual intercourse with her, as shown by affidavits herewith filed. 2. Because the court erred in refusing to permit the defendant to ask the said witness Beason, while upon the witness stand, whether the person in company with him on the road from Amity to his home, on his return from the state fair, was a male or female; and if a female, who she was. 3. Because the court erred in refusing the defendant the right to ask the plaintiffs' witnesses in support of her character for chastity and virtue, after said witnesses had testified that her general character for chastity and virtue was good in the neighborhood where she resided, previous to the 8th day of June, 1870, and on cross-examination, whether or not there was existing in the neighborhood where the plaintiff Rebecca resided previous to June 8th, 1870, a general rumor, suspicioned to be true, that said Rebecca had had illicit sexual intercourse with Isaac R. Beason. 4. Because after witnesses had been introduced by the plaintiff for the purpose specified in clause number 3 above, and after they had testified to the effect as therein stated, the court refused to permit the defendant to ask such witnesses on cross-examination, if there was not existing in the neighborhood where the plaintiff Rebecca resided, on and previous to the 8th day of June, 1870, a general report that the plaintiff Rebecca had been before

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the 8th day of June, 1870, guilty of illicit sexual intercourse with one Isaac R. Beason. 5. Because the court erred in giving instructions number 1, 5, and 9, given by the court on his own motion. 6. Because the court erred in refusing to give instruction number — asked by the defendant.

"5. Because of misconduct of the said plaintiffs upon the trial of this cause, in this, namely, that the said plaintiffs, while Isaac Beason, a witness for plaintiffs, was upon the witness stand, and being cross-examined by the defendant, instructed said witness not to answer a question propounded by the defendant, and allowed by the court, and which question sought proof of the name of the person in company with said witness on his road home from Amity, on Friday night of the state fair, 1868, and which question said witness, acting under the direction of plaintiffs' counsel, refused to answer, and was committed to jail by reason of such refusal, and said defendant deprived of the benefit of said evidence."

The only question in this case is, did the court err in overruling the motion for a new trial? If we find one good reason for a new trial, the question must be answered in the affirmative, though many insufficient causes are stated.

A witness for the defence had sworn that at a certain place and time he saw the female plaintiff and one Beason having sexual intercourse. If true, this was a good defence under the state of the pleadings. Beason was placed on the witness stand by and for the plaintiffs, and swore that he did not have sexual intercourse with the female plaintiff at that time and place, nor at any other time and place. He admitted that he was, at the time and place named by the first witness (being between 9 and 10 o'clock at night), in company with another person, and that they sat down and lay down, but he refused to answer who the other person was, whether male or female, and the court refused to compel him to answer.

For the purpose of laying the proper foundation of impeaching Beason, he was asked: "Did you not in conver-

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sation with John Goldsberry, at or near the town of Jollity, about two years ago, while sitting on a fence, state to him that you had had sexual intercourse with the plaintiff Rebecca Brockman?" On the objection of the plaintiffs, the court refused to allow the witness to answer the question. This was error. 1 Greenl. Ev., sec. 462.

The judgment is reversed, at the costs of the appellees, with instructions to the court below to sustain the motion for a new trial, and for further proceedings.

JOSEPH v. BURK.

INJUNCTION.—Collection of Judgment.—The collection of judgments on fines assessed for violation of a criminal statute cannot be enjoined on the ground that the judgments are void on their face, for want of jurisdiction of the court, because there were no valid affidavits upon which the prosecutions were based, because the judgments do not describe any offences against the laws of the State, or because the law for the violation of which the fines and judgments were rendered was repealed after the judgments were rendered.

From the Hamilton Circuit Court.

J. W. Evans and R. R. Stephenson, for appellant.

DOWNEY, C. J.—On the 16th day of January, 1873, six several judgments were rendered against the appellant for a fine and costs for violation of the temperance law of March 5th, 1859, 1 G. & H. 614, by and before one Jacob B. Loehr, a justice of the peace of Hamilton county. On the 18th day of April, 1873, the appellant filed his complaint in this case, to which he made the justice of the peace a party, seeking to enjoin him from issuing executions on the judgments for their collection. The judgments were all rendered upon a plea of guilty, and had been replevied. The grounds upon which the relief is sought are:

i. That the judgments are void upon their face.

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2. That the justice of the peace had no jurisdiction of the offences.
3. Because there were no valid affidavits filed with the justice of the peace upon which to base the judgments.
4. The judgments do not describe any offence against the laws of the State for which the justice had a right to assess a fine.
5. Because said fines and costs were all assessed and taxed against this plaintiff, as appears by the copies of the same filed with the complaint, on the 16th of January, 1873, for retailing intoxicating liquors without license, while all the laws in force in this State on said 16th day of January, 1873, against selling intoxicating liquors, or regulating their sale, have since that time been repealed by legislative enactment.

The defendant demurred to the complaint for the reason that it did not state facts sufficient to constitute a cause of action. His demurrer was sustained, and there was final judgment for the defendant. This is the ruling of the court which is assigned as error. Burk has come into the case as the successor in office of Loehr, since the case has been in this court.

If a statute on which a criminal prosecution is founded be repealed while the action is pending, and before judgment, there can be no judgment rendered in the case unless there is a saving clause in the act by which the pending action may proceed to judgment. *The State v. Loyd*, 2 Ind. 659; *Taylor v. The State*, 7 Blackf. 93; *Hunt v. Jennings*, 5 Blackf. 195; *Spencer v. The State*, 5 Ind. 41; *Gaspar v. The State*, 11 Ind. 548; *Spriggs v. The State*, 2 Ind. 75.

But this is not such a case. Here the judgments had been rendered before the repeal of the statute upon which the cases were founded.

The law was valid and in full force when the judgments were rendered. For the infraction of the law, the defendant had forfeited, and has been adjudged to pay to the State, cer-

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tain sums of money. The right of the State to have from the defendant these sums of money was fixed and finally determined by the judgments. It no longer depended upon the existence or non-existence of the law for the violation of which the fines had been imposed. The amounts had become debts due from the defendant to the State, existing independent of the particular statute for the violation of which the judgments were rendered. 3 Bl. Com. 378 and 379, original paging, and *Cassel v. Scott*, 17 Ind. 514.

We do not think the collection of the judgments can be enjoined on any of the grounds mentioned in the complaint.

The judgment is affirmed, with costs.

PETTIT, J., dissents.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

JOSEPH *v.* BURK.

From the Hamilton Circuit Court.

J. W. Evans and R. R. Stephenson, for appellant.

DOWNEY, C. J.—This case is affirmed on the authority of another case between the same parties, involving the same questions. *Joseph v. Burk, ante*, p. 59.

Costs against the appellant.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

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HOLLOWAY v. PORTER ET AL.

PROMISSORY NOTE.—*Negotiability of.*—All promissory notes are negotiable in this State by statute, but not as inland bills of exchange unless payable in a bank in this State; and in that case the note on its face must designate the particular bank in which it is payable.

SAME.—The difference between negotiability merely, and negotiability as inland bills of exchange, discussed.

SAME.—*Common Law.*—Promissory notes were not negotiable as inland bills by the common law, but were first made so negotiable by the statute of Anne.

ENGLISH STATUTES.—*What Adopted by this State.*—Chapter eighty-seven of the Revised Statutes, 1 G. & H. 415, adopts as the law of this State the common law of England and statutes in aid thereof of a general nature, etc., made by the British Parliament prior to the fourth year of James I. (A. D. 1607); but the statute of Anne relating to the negotiability of promissory notes was passed nearly one hundred years later, and was never in force here.

From the Carroll Common Pleas.

B. B. Daily, D. B. Graham, L. B. Sims, J. H. Stewart,
and *R. P. Davidson*, for appellant.

J. McCabe, for appellees.

DOWNEY, J.—This case might be disposed of by a simple reference to the opinion in *Porter v. Holloway*, 43 Ind. 35, as the question decided in that case is the only question which need be decided in disposing of this one. After the overruling of the petition for a rehearing in that case, however, a brief was filed by the attorney for the appellees, in which he evinces so much confidence in the belief that the court has erred in its ruling in that case, that it seems proper that we should again consider the question decided. The note on which the complaint is predicated in this case, like the note in that case, is payable at "the bank in Delphi." We arrived at the conclusion in that case that in order to bring a promissory note within the statute making notes payable to order or bearer in a bank in this State negotiable as inland bills of exchange, the note on its face must designate the bank in which it is payable. We did not decide that it was necessary, in order to make promissory notes negotiable, that they must be made payable at a desig-

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nated bank, or at any bank. All promissory notes are made negotiable by indorsement, "so as to vest the property thereof in each indorsee successively," and the assignee may sue thereon in his own name. But whatever defence or set-off the maker had before notice of the assignment against an assignor, or against the original payee, he may have against their assignee. And any such assignee, having used due diligence in the premises, may have his action against his immediate or any remote indorser, and in a suit against a remote indorser, he may have any defence which he might have had in a suit brought by his immediate assignee. These propositions are taken from the first four sections of the statute relating to promissory notes, etc., 2 G. & H. 658. The next section, the fifth, declares that the provisions of the third and fourth sections, which relate to the defences that may be made to an action, "shall not alter the law relative to bills of exchange, as it now is." That is to say, the law as to bills of exchange is not altered by the statute. Then follows the sixth section, which says: "Notes payable to order or bearer in a bank in this State, shall be negotiable as inland bills of exchange, and the payees and endorsee thereof may recover as in case of such bills." Counsel says if we look to the statute alone and to no other law, then we have no such thing in this State as commercial promissory notes. The ground is assumed that the only effect of the statute upon such notes is to bring them down, or to take away from them certain privileges and immunities which the statute assumes they already possess. Counsel says it is only by the act adopting the English common law and acts of Parliament in aid thereof, that we have such a thing as a promissory note, and that it is to the common law that we must look to ascertain what it takes to constitute a promissory note; what are its characteristics, its essential properties, etc. It is said that at common law they are of two kinds, negotiable and non-negotiable; negotiable when payable to order or bearer, and non-negotiable when payable to a particular person.

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There must be some chronological mistake here. The date to which our adoption of the common law of England and the statutes made in aid thereof relates, is the fourth year of the reign of James I. See 1 G. & H. 415. The reign of James I. began in 1603. There is no satisfactory evidence that promissory notes were negotiable in England until long after that date. The statute of Anne, passed nearly a hundred years after the date to which our adoption of the common law relates, declared them negotiable. The preamble to that statute recites as the reason for its enactment, that promissory notes had been held not to be negotiable. That statute declared that "all notes in writing that shall be made and signed by any person, etc., whereby such person, etc., shall promise to pay to any other person, etc., his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person, etc. to whom the same is made payable; and also, every such note payable to any person, etc., his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants," etc. In *Grant v. Vaughn*, 3 Burr. 1516, decided in 1764, Lord MANSFIELD said: "Upon looking into the reports of the cases on this head, in the time of King William the Third and Queen Anne, it is difficult to discover by them, when the question arises upon a bill, and when upon a note, for the reporters do not express themselves, with sufficient precision, but use the words 'note' and 'bill' promiscuously."

It is certain that Lord HOLT in the reign of Anne denied the negotiability of promissory notes, and some writers say that this was the occasion of the passage of the statute of Anne. Sir WILLIAM BLACKSTONE says: "Promissory notes, or notes of hand, are a plain and direct engagement, in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also, by the same statute of 3 and

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4 Anne, c. 9, are made assignable and indorsable in like manner as bills of exchange." Book 2, p. 467.

Chancellor KENT says: "Promissory notes are governed by the rules that apply to bills. The statute of 3d and 4th Anne made promissory notes payable to a person, and to his order, or bearer, negotiable like inland bills, according to the custom of merchants, and by the statutes of 9 and 10 William III., c. 17, and 3 and 4 Anne, inland bills are put upon the footing of foreign bills, except that no protest is requisite. These statutes have been generally adopted in this country, either formally or in effect, and promissory notes are everywhere negotiable. The effect of the statute is to make notes, when negotiated, assume the shape and operation of bills, and to render the analogy between them so strong, that the rules established with respect to the one apply to the other. It was a question much discussed before the statute of Anne, whether notes were not, by the principles of the law merchant, to be treated as bills; and Lord HOLT vigorously and successfully resisted every such attempt. The history of that struggle is no longer interesting; but there is no doubt that promissory notes were recognized as mercantile instruments, and a species of bills of exchange, by the canon law and the usage of trade; and even by the French ordinance of 1673, long before Lord HOLT asserted them to be of late English invention." Vol. 3, p. 73.

Prof. PARSONS says: "We have not space to examine this question at length, and upon the authorities, but will content ourselves with saying, that we incline to hold, first, that foreign negotiable bills were in use and were known to the law long before negotiable notes were known; and second, that inland negotiable bills were in use before negotiable notes, which, however, is not quite certain; third, that inland bills and notes were confounded together in the use of them by merchants, and were considered as the same thing, both by them and by some of the courts; fourth, that these notes, although not always discriminated by name from bills of

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exchange, were certainly in common use before that statute—the statute of Anne—as may be inferred from the insisting of the merchants on the great mischief which would result from the denial of their negotiability, they telling Lord HOLT ‘that it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years; and, fifth, that these notes were, therefore, at the time the statute was made, negotiable by the law merchant of England, which was and is as much a part of the law of England as—to use the strong language of Christian—the laws relating to marriage or murder.’ 1 Parsons Notes & Bills, 11. Lord HOLT insisted that “the notes in question are only an invention of the goldsmiths in Lombard street, who had a mind to make a law to bind all those who did deal with them,” etc. HOLT was appointed Chief Justice in 1689. Conceding that the goldsmiths had been treating promissory notes as negotiable for thirty years, as they claimed, still that time would not reach back to the time to which our adoption of the common law relates. We look to the statute of Anne, as fixing the date at which promissory notes were definitely placed on a footing with bills of exchange in England, and made negotiable like them.

The statute of Anne is not in force in this State. It was not yet enacted at the date to which our adoption of the laws of England relates. Hence we must look to our own statutes for the law relating to the negotiability of promissory notes. By reference to it, we find that only such as are payable to order or bearer, in a bank in this State, are negotiable as inland bills of exchange. All others are made negotiable by the statute, but not as inland bills of exchange. They are governed by different rules. But this question ought not to be regarded as an open one in this State. As far back in the history of the adjudications of this court as *Bullitt v. Scribner*, 1 Blackf. 14, it was said that promissory notes were not governed by the law merchant, until they were put upon a footing with bills of exchange by the statute of Anne.

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That statute was never in force in this State. See note I to the same decision.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

Petition for a rehearing overruled.

PRATT ET AL. v. CARR ET AL., ADM'RS.

PARTIES.—*Trust.*—*Decedents' Estates.*—Pending an attachment proceeding, in which certain goods had been seized and were held by the sheriff, an order of court was made by consent of all the parties interested, that the sheriff should sell said goods, and that he might sell on a credit, taking the notes of purchasers, with approved security. On making sales, the sheriff took notes payable to himself individually, and before the termination of the suit he died. *Held,* that the sheriff held the notes as a trustee; that he had no interest in them that could pass to his administrators, and that the latter, not being the parties in interest, could not maintain an action on a note so given.

From the Hancock Common Pleas.

H. J. Dunbar and E. Marsh, for appellants.

C. G. Offutt, G. H. Voss, B. F. Davis, and F. A. Holman, for appellees.

PETTIT, J.—This suit was brought by the appellees, James H. Carr and Mary J. Wilkins, administrators of William Wilkins deceased, against the appellants, William F. Pratt, Joseph Baldwin, and Hugh Pratt, on two promissory notes payable to the deceased. The complaint was in the usual and proper form.

The defendants answered as follows:

"Comes now William F. Pratt, Joseph Baldwin, and Hugh Pratt, defendants, and say that they admit the execution of said notes, but aver that the same were executed for the purchase-money of a certain stock of goods, groceries, notions, clothing, etc., which in the month of April, 1868, were

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attached by virtue of a writ of attachment then and there held by the decedent, named in plaintiffs' complaint, who was then and there in full life and sheriff of the county of Hancock, in the State of Indiana; that said goods, etc., were attached as aforesaid, in a certain cause pending in the Hancock Circuit Court, in the State of Indiana, wherein Van Camp Bush *et al.* were plaintiffs, and one John J. Crider was defendant, to which one John C. Atkison was made a party on his own petition, claiming and averring in said petition, that he held a mortgage on said goods for about the sum of nine-thousand dollars, and said Atkison asked therein that said mortgage be foreclosed and said goods be sold to satisfy said mortgage; and defendants herein say that afterward, at the February term, 1872, of said Hancock Circuit Court, in the State of Indiana, the said Wilkins being still sheriff as aforesaid, and still in possession of said goods as such sheriff, by virtue of the said writ of attachment on which said Wilkins as sheriff had seized the same; the sheriff was ordered by the said court to sell said goods, etc., and to retain the proceeds of such sale until further ordered by said court; and plaintiffs say that said order, a copy of which, marked 'A,' is filed with and made a part of this answer, is in full force; and defendants herein say that said sheriff, William Wilkins, in pursuance of said order, sold said goods, etc., to the defendant William F. Pratt, and that said Pratt and his co-defendants, as his sureties, executed the notes sued on therefor, and not for any other consideration whatever, or for any other purpose; and defendants say that neither said Wilkins nor any of the defendants were parties to said action, wherein said goods were attached, and neither said Wilkins nor his administrators had or have any other or different interest in said notes or either of said notes than as aforesaid; that said action of *Bush et al. v. Crider*, to which said Atkison is a party, has never been finally determined, and said notes and the proceeds of the sale of said goods are still subject to the orders of said circuit court; and that said Wilkins continued to be sheriff of said county, and as such

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sheriff to hold said notes until his death, to wit, February 9th, A. D., 1872, and that upon his death George W. Sample was duly appointed, commissioned, and qualified as sheriff of said county, and has ever since continued and now is sheriff of said county; wherefore the defendants say that said plaintiffs are not the real parties in interest, or proper plaintiffs herein, but that said Sample is the real party in interest and proper party plaintiff."

Exhibit "A" filed with and made a part of this answer, being the proceedings in attachment in the circuit court, so far as it is necessary to set it out, is this: "And by agreement of the parties, it is ordered by the court that the sheriff proceed to sell either at public or private sale, as he may deem for the advancement of the parties, the stock of goods, groceries, notions, clothing, etc., attached in this cause, giving a credit upon all sums of one hundred dollars and upwards until the 25th day of next December, the purchaser giving his note with approved security. No rights of either party, with reference to any acts heretofore done or omitted to be done, are in any manner to be affected by this agreement. Ordered that the proceeds of sales herein shall be held by said sheriff until further ordered by this court."

To this answer, a demurrer for want of sufficient facts was sustained, and this ruling presents the only question in the case. Was the answer good or bad?

Wilkins, the deceased, had no interest in the notes that he could have disposed of by will, and consequently he had no interest in them that would or could vest in his administrators by operation of law. He was a mere official trustee, holding the notes by order of the court, and subject to be deprived of their possession at any time by the further order of the court, or by the agreement of the parties to the attachment suit, for whose benefit they were held.

Wilkins had no greater legal or equitable interest in or title to the notes than he had in the attached property, for which they were given on its sale under the order of the court. In the Indiana Executor's Manual, page 41, this language is

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used, which we approve: "The absolute property in the goods must have been vested in the decedent, in order to make them assets in the hands of his executor or administrator. Therefore, if the decedent takes a bond in his own name, but in trust for another, and dies, this is not assets in the hands of the executor or administrator." That the notes were made payable to Wilkins by name and not to him as sheriff, makes no difference in legal effect. The court erred in sustaining the demurrer to the answer.

The judgment is reversed, at the costs of the appellees, with instruction to overrule the demurrer to the first paragraph of the answer.

Petition for a rehearing overruled.

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46	70
130	500
46	70
132	330
46	70
138	372
46	70
143	196
143	223

PRACTICE.—*Nunc Pro Tunc Entry.*—*Appearance To Motion.*—Where a party has notice to appear to a motion to correct a record by an entry *nunc pro tunc*, and no objection is made to the notice in the court below, and the party appears to the motion, and the sufficiency of the notice is not tested by a motion to reject or strike out, no question is presented thereon for review.

EVIDENCE.—*Supreme Court.*—Where evidence is conflicting, but preponderates in favor of the finding below, the Supreme Court will not disturb the finding.

PLEADING.—*Complaint for Review.*—A complaint to review a judgment on the ground that there was no appearance, answer, or default of the defendant seeking to have the judgment reviewed is bad if the record shows that there was an appearance and that an answer was filed.

COMMENCEMENT OF ACTION.—The filing of an amended complaint, after a demurrer has been sustained to the original, is not the commencement of the action.

PRACTICE.—*Relief from Judgment Taken Through Mistake, etc.*—*Amendment.*—If proceedings to set aside a judgment, under section 99 of the code, are commenced within two years after the rendition of the judgment, the relief may be granted after the expiration of two years, and the pleadings are subject to amendment as in other cases.

SAME.—*Diligence.*—The doctrine applicable to fraud in contracts and judgments, in relation to the diligence that must be used in bringing the action, has no application to a proceeding under section 99 of the code, as amended, to set aside a judgment.

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SAME.—*Discretion of Court.*—Under section 99 of the code, as amended, where it is shown that the default was taken through mistake, inadvertence, surprise, or excusable neglect of the party applying for relief, the court has no discretion, but must grant relief.

APPEARANCE.—*Defect in Process.*—An appearance to an action by an attorney prevents an objection to the process.

SAME.—*Appearance by Attorney Without Authority.*—An appearance to an action by an attorney, although unauthorized, is binding upon the party until set aside.

PRACTICE.—*Relief from Mistake, etc.*—Where the record of a cause shows that a defendant was served with process, appeared by attorney, and by attorney joined with other defendants in an answer, and that there was a trial by jury, and a judgment and decree rendered on a finding of the jury, such party is not entitled to be relieved from such judgment on the ground of irregularity in the service of process, ignorance of the nature of the action, and that all of the proceedings were had and determined without his knowledge.

NUNC PRO TUNC ENTRY.—A *nunc pro tunc* entry is made as of the time the proceedings of the court actually took place, and becomes a part of the entry of that date, the same as if entered then.

From the Marion Circuit Court.

F. M. Finch and F. A. Finch, for appellant.

N. B. Taylor, F. Rand, and E. Taylor, for appellee.

BUSKIRK, J.—Upon the suggestion of the court, and by the agreement of the parties, the above cases have been consolidated, and will be considered together. The matter has become very complicated and will require a careful and full statement of the various suits and issues involved to present in an intelligible manner the questions of law presented for our decision.

On the 5th day of January, 1867, Hannah Bush obtained a judgment in the court below, against one Jacob Bush, a son of the appellant, for a divorce and two thousand dollars alimony, and an order was made requiring him to pay monthly a certain sum of money, for the support, maintenance, and education of the children of the parties, the custody of whom was given to Hannah.

On the 25th day of January, 1870, Hannah Bush filed her complaint in the court below, against Conrad Bush and Elizabeth Bush, his wife (since deceased), Jacob Bush, and

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John B. Cleveland, to subject certain real estate, held by the appellant, to the payment of the first named judgment, upon the alleged ground that it was held by him fraudulently for Jacob Bush. Cleveland was made a party, and afterward others were made parties, to foreclose any interest they might have in the property, and bar their right of redemption, if any there was. The court, on the 14th of January, 1870, rendered a decree subjecting such property to sale to satisfy the decree for alimony and the monthly instalments for the support of the children.

On the 8th of February, 1872, the appellant filed his complaint for relief from the last named judgment. The appellees Taylor and Rand were made defendants, because they claimed to have some interest in the real estate sold under said judgment.

The complaint originally consisted of one paragraph, to which a demurrer was sustained; whereupon the appellant took leave to amend and filed what is termed the second paragraph, but which is in reality a substituted complaint and takes the place of the first paragraph, which went out of the case and should not have been copied into the record. The appellant also filed a third paragraph of complaint. Demurrs were sustained to each of the paragraphs, to which ruling the appellant excepted, and refusing to plead further, judgment was rendered on the demurrs for the appellees. From this judgment the appellant appealed to this court and assigned for error the sustaining of the demurrs to the second and third paragraphs of the complaint.

The second and third paragraphs of the complaint contain, in substance, the following averments:

That a judgment had been taken against him in favor of Hannah Bush, subjecting all of his property to the payment of her judgment against Jacob Bush; that an execution had been issued thereon, under and by virtue of which a part of the property had been sold and bought by Hannah Bush, for herself and her co-defendants, Taylor and Rand; that such judgment had been taken against him wholly without

any knowledge on his part of the pendency of said action, and was taken under the following facts and circumstances : That he is seventy-seven years of age, of German birth, and wholly ignorant of the English language and forms of legal procedure ; that the appellee Hannah, knowing this ignorance, and knowing that if the summons was read to him in the English language, and no copy left with him, he would not understand the meaning or purport thereof, did not order the sheriff to explain the contents and meaning of the summons, or to leave a copy with him ; that the officer to whom the summons was delivered for service, well knowing his ignorance of the English language, and knowing that if the summons was read to him and the contents thereof not translated, and no copy left with him, he would not understand the purport of the summons, served the same by reading it to him in the English language, and did not explain or translate it to him, and did not leave a copy of the same with him ; that by reason of such ignorance of the English language, and by reason of the failure of the said Hannah to order the said sheriff to explain the contents of the summons or leave a copy of the same with him, and by reason of the failure of the officer to explain or translate the summons to him or to leave a copy with him, he did not understand the contents, meaning, and purport of the summons, and did not know that he had been summoned to answer the complaint of Hannah Bush ; that he had heard of the suit between Hannah and Jacob for divorce, and that the officer who had this summons was the same who had frequently come to his house for Jacob ; that he thought the paper the officer had was for Jacob, or concerning the said suit between Hannah and Jacob, and not anything affecting him ; that he was not then in fact and truth informed that any suit was being instituted against him, but was wholly under the mistake of supposing that the said Jacob was alone concerned ; that the said judgment was obtained against him while he was still in ignorance of the true nature of the suit ; that not knowing that the suit was against him,

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he did not employ any counsel or authorize any one to employ counsel to defend him in said suit; that by a copy of the complete record of said suit filed, it will appear that on the 25th day of May, 1869, a rule was taken against him to answer the complaint of the said Hannah; that he did not answer in person or by attorney; that the court proceeded thereafter with said suit without having taken a default against him; that all of said proceedings were had and determined without his presence or knowledge, and without any presentation of his defence; that the whole of the proceedings in said trial were by and between the said Hannah and his co-defendant, without appearance or pleading by him; that he did not know that said suit affected or concerned him, or that any judgment was rendered which affected his property, until the summer of 1871, when he was informed that his property had been sold by the sheriff and would be taken from him; that the conveyances of the land taken by the said judgment of the said Hannah were fairly and honestly obtained; that he paid therefor a valuable consideration as therein expressed; and that there was no fraudulent collusion between him and Jacob Bush, or between him and any other person, in obtaining title to the said property.

The third paragraph recites the recovery of the judgment in favor of Hannah against the appellant, setting aside as fraudulent the conveyances from Jacob Bush to appellant and subjecting the same to sale for the satisfaction of the decree in favor of Hannah and against Jacob, and prays for a review of such judgment, because the court heard, tried, and determined said cause, and adjudged upon his rights without any appearance by him, or by any one authorized by him to appear, and without any answer, demurrer, or other pleading put in by him to said action, and without any default being taken against him, all of which appears of record.

By the second paragraph, the appellant sought to be relieved of such judgment under section 99 of the code as

amended, 3 Ind. Stat. 373, because the judgment was taken by his excusable neglect.

By the third paragraph, the appellant sought a review of the proceedings under section 586, 2 G. & H. 279, for error on the face of the record, because the judgment was taken without appearance, issue, or default.

On the 28th day of May, 1873, the appellees filed in this court a written motion, supported by affidavits, for a writ of *certiorari* to the clerk of the court below, requiring him to certify and transmit to this court a properly certified transcript of the record and proceedings in the case of *Hannah Bush v. Jacob Bush, Conrad Bush, and others*, mentioned and set forth in the record in this cause, which were had and finally done and entered on the records of the court below in the said cause, on the 5th day of April, 1873, on the motion of the said Hannah Bush to correct the record in the said cause, so as to show that said Conrad Bush appeared and filed

an answer in said cause.

A *certiorari* was awarded, and the clerk of the court below in obedience to said writ has certified up the record and proceedings had on the said motion, by which it appears that the court below, after the appeal had been perfected in this cause, on motion, notice, and proof, had found that the original record was incorrect in not showing that the appellant had appeared by counsel and filed an answer in said cause, and that the court thereupon ordered and adjudged that the said record should be amended, now for then, so as to make it appear that, upon the original hearing of the said cause, the appellant appeared by attorney and filed an answer thereto.

The appellees have filed in this court an answer in bar of this appeal. The answer recites all the facts hereinbefore stated in this opinion, and then alleges, in substance, that on the 21st day of July, 1871, Hannah Bush filed a supplemental complaint in said cause, against Jacob Bush, Conrad Bush, and Samuel H. Brumfield, showing that, after the sale of certain lots which are described in the first and sec-

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ond judgments, there remained due and unpaid of said decree of two thousand dollars for alimony the sum of three hundred and twenty-nine dollars and four cents, and of the decree for monthly payments for the support of the children the sum of eight hundred and eighty-nine dollars and fifty-four cents; that pending the suit commenced January 25th, 1869, said Conrad Bush conveyed thirteen acres of land, which had been fraudulently conveyed to him by Jacob Bush, to Samuel H. Brumfield; that such conveyance was made without any consideration and for the fraudulent purpose of cheating the said Hannah and hindering and delaying her in the collection of the said decree for alimony and the support of her said children; that the said defendants were summoned to answer said complaint, the said Jacob by reading and the others by reading and copy; that Jacob Bush and Samuel H. Brumfield appeared and answered, and Conrad Bush suffered a default; that on the 4th day of March, 1873, the said cause was tried, and a decree entered, in which the court found, first, that the amount due Hannah Bush, on the decree of June 14th, 1870, at the date of the sale by the sheriff of a part of the real estate described in said decree, was three thousand sixty-two dollars and fifty-four cents; that on the 16th day of July, 1870, the sheriff of said county sold under the decree of June 14th, 1870, subjecting the real estate of the said Jacob Bush, which had been fraudulently conveyed to Conrad Bush, lots eleven and twelve, in said decree described, to said Hannah, for two thousand eight hundred dollars; that after deducting the sum of sixty-six dollars and fifty cents costs of such sale, there was a credit of two thousand seven hundred and thirty-three dollars and fifty cents to be deducted from said sum of three thousand sixty-two dollars and fifty-four cents, and left unsatisfied of said decree the sum of three hundred and twenty-nine dollars and four cents; that the decree for monthly payments for the support of the children remained wholly due and unpaid, and there was at such time due the said Hannah on said decree the sum of eight hundred and eighty-nine dollars

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and fifty-four cents; second, that the said Samuel H. Brumfield was a *lis pendens* purchaser of said real estate; that the conveyance from Jacob to Conrad was without consideration and fraudulent, and that the conveyance from Conrad to Brumfield was without consideration and fraudulent, in which fraud the said Brumfield participated; that the said thirteen-acre tract of land should be sold by the sheriff, to satisfy the amount so found due; that a decree was rendered in accordance with the finding of the court; that there was no exception to such decree; there was no motion for a new trial, and no appeal; and that said judgment remained in full force and unreversed. To this answer the appellant has demurred.

The above statement shows the history and present *status* of case number 3351, being the first case stated at the commencement of this opinion.

The other case was a proceeding by notice and motion to amend the record of the court below in the suit commenced on the 25th day of January, 1870, to set aside as fraudulent the deeds from Jacob to Conrad Bush and to subject such real estate to sale for the payment of the decrees rendered in the first action between the said Hannah and Jacob. It was alleged in the notice and motion that the record was incorrect in not showing affirmatively that Conrad Bush appeared to such action and filed an answer. All the persons made defendants thereto appeared and answered. There was a trial by the court and a finding that the record was incorrect and should be amended. The court then ordered an entry made *nunc pro tunc* amending said record.

The amendment of the record having been certified and made a part of the record in the other case, we shall for the purposes of that case have to regard the record as amended and showing an appearance and answer on the part of the appellant, unless we find that the amendment was improperly made; but as the cases have been consolidated and are to be decided together, it is convenient and proper that we should, in the first place, determine whether the correction was prop-

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erly made. It is, however, insisted by counsel for appellees, that the record presents no question for our decision, and after a careful examination of the record we have reached the conclusion that the objection is well taken. There was no objection in the court below to the notice. The parties appeared without objection. The sufficiency of the motion was not tested either by a motion to reject or strike out. The reversal of the judgment ordering the correction of the record is demanded upon the sole ground that it is not supported by the evidence. We have carefully read and duly considered all the evidence in the record. The point of controversy was this: Jacob Bush confessedly appeared by Perkins & Perkins, his attorneys, who filed an answer for him. The answer purports to be for all the defendants. The entry made by the clerk only showed that Jacob Bush appeared and filed an answer. The amendment sought and obtained was to show that Conrad Bush also appeared and filed an answer. All the papers in the original case, together with the minutes of the court and the various entries made in the different records by the clerk, were read in evidence. A large number of affidavits were also read. There is an irreconcilable conflict in the affidavits. Being unable to harmonize the evidence, we have compared, weighed, and considered it with great care and have reached the conclusion that it very decidedly preponderates in favor of the finding of the court. In such a condition of the evidence, we cannot disturb the finding of the court upon the question of fact. *The Madison, etc., R. R. Co. v. Taffe*, 37 Ind. 361.

We are of opinion that the court committed no error in finding that the appellant appeared by attorney and filed an answer.

The judgment is affirmed, with costs.

We return to the consideration of the other case.

As the record now stands, there was no error in sustaining the demurrer to the third paragraph of the complaint.

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That paragraph sought to review the judgment, because there was no appearance, answer, or default against appellant. The record now shows there was an appearance and answer filed, and consequently there was nothing to review. The amendment has relation back to and is operative from the date of the original judgment.

This leaves for our consideration the action of the court below in sustaining the demurrer to the second paragraph of the complaint, and our ruling upon the demurrer of appellant to the answer of appellees.

It is insisted by counsel for appellees that the ruling of the court below was correct, because that paragraph of the complaint was filed more than two years after the original judgment was rendered, and that, therefore, the court could grant no relief, however excusable the neglect may have been. We do not think the objection is tenable. Under the original section 99, this court held that the relief must be granted within a year from the rendition of the judgment. *Woolley v. Woolley*, 12 Ind. 663; *Sturgis v. Fay*, 16 Ind. 429; *Quick v. Goodwin*, 19 Ind. 438; *Ewing v. Ewing*, 24 Ind. 468.

Under the section as amended, 3 Ind. Stat. 373, the application may be made by motion or complaint at any time within two years, and it applies the limitation to the time of instituting the proceedings for relief, instead of the time within which it could be granted by the court. *Smith v. Noe*, 30 Ind. 117. The complaint in the present case was filed and the summons issued within two years, but a demurrer was sustained to the original complaint and a substituted one filed after two years from the rendition of the judgment. This was not the commencement of the action. It had been commenced within the two years, and the relief might be granted after the expiration of the two years. The court having, by the commencement of the action within the time limited, acquired jurisdiction, had the right to retain it, and grant the relief afterward, and the pleadings were subject to amendment as in other cases under the code.

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Ewing v. Patterson, 35 Ind. 326; *Gaff v. Hutchinson*, 38 Ind. 341. It is next contended by counsel for appellees that the appellant did not exercise reasonable diligence in the commencement of the action to be relieved from the judgment, after he had discovered the existence of the judgment against him, and has thereby forfeited all right to relief. It is alleged in the second paragraph of the complaint, that the appellant did not ascertain the fact that any action had been pending against him or judgment rendered until in the summer of 1871. The action was commenced on the 8th of February, 1872. It was held by this court in *Patten v. Stewart*, 24 Ind. 332, that "a party who seeks the aid of the court to compel the rescission of a contract for fraud, must show that he has exercised at least reasonable diligence in ascertaining the facts, if readily within his power, and has been prompt in seeking his remedy within a reasonable time after the facts constituting the fraud are discovered. The relief is granted to the vigilant, but denied to the negligent."

The doctrine as above stated, in respect to the commencement of an action, after the discovery of the facts constituting the fraud, was materially modified by this court in *Potter v. Smith*, 36 Ind. 231, where the court say: "The distinction between bringing, and laying the foundation for an action must not be disregarded. There are cases where a man must act promptly and within a reasonable time, in order to be entitled to an action; *e. g.*, if he finds himself defrauded in a contract, he may be required, in order to rescind, to act promptly on the discovery of the fraud, and tender back to the other party what he has received, thereby placing him *in statu quo*, and demand a rescission; but having done all that is necessary to entitle him to a rescission, he may bring his action therefor at any time before he is barred by the statute."

It has been held by this court that an application for relief against a judgment, upon the ground that it was procured by fraud, was not based upon section 99 of the code, but upon section 356 of the code, 2 G. & H. 215. *Woolley v. Wool-*

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ley, 12 Ind. 663; *McQuigg v. McQuigg*, 13 Ind. 294; *Rindge v. Rindge*, 22 Ind. 31; *Gage v. Clark*, 22 Ind. 163; *De Armond v. Adams*, 25 Ind. 455.

In our opinion, the doctrine, as applicable to fraud in contracts and judgments, has no application to the present action. The time within which the action must be brought is fixed and limited to two years by sec. 99, as amended, and we have no power to say that the action must be brought sooner than the time named in the statute.

This brings us to inquire whether the facts stated in the second paragraph of the complaint were sufficient to require of the court below to set aside the judgment rendered against the appellant and permit him to make a defence to the action. As the record stood at the time the court sustained the demurrer to the second paragraph of the answer, we think the facts stated entitled the appellant to the relief he sought. The summons was returned served by reading. This was in compliance with the statute and gave the court jurisdiction of the person of the appellant. The service was upon its face sufficient. The appellant by the statement of facts endeavored to show that his negligence was excusable, and that for that reason the judgment should be set aside and he permitted to make a defence. The appellant was a very aged man, of German birth, and wholly ignorant of our language, and might have reasonably supposed that the paper read to him related to the litigation pending between his son and his wife. The case of *Bertline v. Bauer*, 25 Wis. 486, is much in point and has an important bearing upon the present case. There, the summons was served upon the defendant by reading and a copy, and the officer tried to explain the purport and purpose of the summons. There, the defendant was a German and wholly ignorant of our language. He failed to appear and judgment was rendered against him by default. He afterward sought to be relieved from such judgment. His affidavit stated that he never had, to his knowledge, any summons or complaint served upon

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him in the action ; that his first knowledge or idea that any civil action was pending against him was on the day that he was informed of the rendition of the judgment ; that he is a German and unable to read, speak, or understand the English language.

The plaintiff, on the other hand, showed that the defendant had been served by the sheriff's delivering a copy of the summons to the defendant personally, and leaving it with him ; that the sheriff explained the summons to the defendant at his request ; that the defendant offered plaintiff a sum to settle the action, and was then told by plaintiff's attorney that unless he settled with plaintiff he would have to appear by attorney and defend the action, and had other conversation concerning the case. It appears that there were two actions pending against him, one criminal and the other civil. He had appeared to the criminal action, and thinking that was all the case against him, had suffered the default. The court below set aside the default, and permitted him to defend. The appellate court, in affirming this ruling, says, that " notwithstanding the affidavits presented by the appellant showed clearly enough that the summons was personally served on the defendant, and that he had some sort of an understanding that a suit was pending against him for damages, we still think it cannot be held an abuse of discretion to let the defendant in to answer upon just terms. * * * The statute is remedial in its character, and should be applied liberally, upon just terms, to secure a fair hearing upon the merits, even where there has been some excusable ignorance, stupidity or conceit." *Stafford v. McMillan*, 25 Wis. 566, and cases cited.

Under the original section 99, it was a matter within the sound legal discretion of the court to either grant or refuse relief, and this court would not review the exercise of such discretion unless there appeared to have been a plain abuse of such discretion. *Alexander v. Frary*, 9 Ind. 481; *Harlan v. Edwards*, 13 Ind. 430; *Cooper v. Johnson*, 26 Ind. 247; *Hunter v. Elliott*, 27 Ind. 93. The section has been very

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materially changed. As it now stands, the court has no discretion where it is shown that the default was taken through mistake, inadvertence, surprise, or excusable neglect of the party. In such case the section plainly declares that the court "shall" give relief. This court in *Smith v. Noe*, 30 Ind. 117, uses this language: "It is evident that the legislature, by the use of the word 'shall' in the section as amended, intended to adopt a more liberal practice in such cases, by excluding the idea of any mere discretionary power in the court in granting or refusing the application, and to confer upon the party the right to demand relief, when it is made to appear that the judgment was taken against him through his 'mistake, inadvertence, surprise, or excusable neglect,' and that this court, in reviewing the question, should be governed by the same rule."

But as the record now stands, the error of the court, in overruling the demurrer to the second paragraph of the complaint, cannot avail the appellant. The record as amended shows affirmatively that the appellant appeared by attorney and filed an answer. The defendant's appearance to the action by an attorney prevents him from making any objection to the process. *Eldridge v. Folwell*, 3 Blackf. 207; *Lane v. Fox*, 8 Blackf. 58; *Floyd Co. Agricultural and Mechanical Association v. Tompkins*, 23 Ind. 348. The appearance by an attorney, although unauthorized, is binding upon the party until set aside.

In the case last cited the court say: "It is claimed that it was the duty of the court below to relieve the party for whom the attorney appeared without authority, under the provisions of sec. 775, 2 G. & H. 328, at any time before payment of the judgment; but clearly the remedy under this last section, if the party is entitled to it, cannot be obtained in a proceeding for review. It may be, on a proper application, showing that a judgment had been rendered by default, or for the want of an answer on an appearance by an attorney without authority, and without notice to defendant, even after judgment, the court would allow an issue to

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be formed, and the merits of the case tried; but the court, in order to protect the plaintiff from suffering by the act of the attorney, and at the same time to save the defendant from injury, will let the judgment stand, but stay all proceedings, and let in the defendant to plead if he has any defence, *Denton v. Noyes*, 6 Johns. 296; *Ellsworth v. Campbell*, 31 Barb. 134; *Pierson v. Holman*, 5 Blackf. 482."

Section 775 is as follows: "If it be alleged by a party for whom an attorney appears, that he does so without authority, the court may at any stage of the proceedings relieve such party from the consequences of the attorney's act. It may, also, summarily upon motion, compel the attorney to repair the injury consequent upon his assumption of authority." 2 G. & H. 328.

Plainly and obviously the above section has no application to a case like the present. The first clause was evidently intended to authorize the court to relieve a party from the consequences of an unauthorized appearance, where the application is made during the progress of the case. This is shown by providing that the relief may be granted "at any stage of the proceedings." The last clause gives a remedy against the attorney who has appeared without authority.

The record as amended shows that the appellant appeared by counsel. This record is conclusively binding upon the appellant. It then appears that the appellant was served with process; that he appeared to the action by his attorneys, and joined with the other defendants in filing an answer; that the cause was tried by a jury, who found specially that the conveyance of the land in question by Jacob to Conrad was fraudulent and void. The court then rendered a decree setting aside such conveyance, and ordered the property to be sold to satisfy the decrees of alimony and for the support of the children. With such a record, the facts stated in the second paragraph of the complaint, under examination, presented no ground for relief from such judgment.

In our opinion, the court committed no error in sustaining the demurrer to such paragraph.

Bush *v.* Bush *et al.*, and Bush *v.* Bush.

Having reached the conclusion that the judgment must, for the reasons stated, be affirmed, it becomes wholly unnecessary for us to pass upon the sufficiency of the answer filed in this court in bar of the appeal in the present action, and we therefore decide nothing in reference to such answer.

The judgment is affirmed, with costs.

PER CURIAM.—The appellant has filed a petition for a rehearing in the above cases.

It is insisted that the court directed the *nunc pro tunc* order to be made without sufficient evidence; that it comes here with no presumption in favor of the finding of the court below; and that we are to examine the evidence and decide the question under the same rules of evidence as if it was here *de novo*. We have done so, and are of the opinion that the court below was justified in making the order. We do not consider it necessary to review the evidence in this opinion.

It is also insisted that the *nunc pro tunc* order, when brought here by *certiorari*, is not to be treated by us as a part of the record in the proceedings in the case; that it is simply an exhibit. When the entry was made, it was made as of the time when the proceedings of the court actually took place, and became a part of the record as of that date, the same as if entered then. From that time the record spoke the truth, and correctly recorded the proceedings of the court. The return of the clerk of the court below to the writ of *certiorari* supplied an entry which had been omitted in the original transcript, and made it complete as it then existed.

The mistake of the appellant is in supposing that the return of the clerk to the writ of *certiorari* included additional proceedings in the case; whereas it was simply what was really done, but which the clerk had failed to enter of record. By the return of the clerk, it is legitimately before us, and we must regard it as having been made as of the time when the proceedings took place, and as if the entry had been made at that time.

The petition is overruled.

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PIERCE ET AL. v. PIERCE.

NUNCUPATIVE WILL.—Nuncupative wills are to be restricted to cases falling clearly within the reason of the statute.

SAME.—Soldier.—A person who had enrolled himself in a volunteer company, raised under a call by the Governor for troops in 1862, but had not been accepted and mustered into the service, could not make a nuncupative will as a soldier.

SAME.—Real estate cannot be devised by the nuncupative will of a soldier.

CONSTITUTIONAL LAW.—When a statute has been held unconstitutional by the Supreme Court, it is inoperative while such decision is maintained; but a later decision sustaining such statute gives it vitality from the time of its enactment, and it is to be treated as having been constitutional from the beginning.

SAME.—Descents.—The Act of March 4th, 1853, dividing the property of an intestate, in certain cases, between his parents and his widow, was treated as unconstitutional under the ruling in *Langdon v. Applegate*, 5 Ind. 327; but the case of *The Greencastle Southern Turnpike Co. v. The State, ex rel. Malot*, 28 Ind. 382, established its constitutionality; and the property of an intestate who died between March 4th, 1853, and the repeal of said statute by the act of March 9th, 1867, descended according to its provisions, and a right thereunder might be asserted, where suit was brought within the time limited by the act of 1867.

From the Tippecanoe Common Pleas.

J. A. Stein, M. Jones, J. L. Miller, and W. C. Wilson, for appellants.

H. W. Chase and J. A. Wilstach, for appellee.

DOWNEY, J.—The appellee sued the appellants, and had judgment in her favor. The questions presented relate to the sufficiency of the complaint, and the correctness of the ruling of the court in refusing to grant a new trial on the motion of the appellants. The points in question are such that it is not necessary to set out the pleadings, or to state the reasons for a new trial at length, in order to understand them.

The complaint was against Lydia Pierce, the widow of James M. Pierce, deceased, and Mark Jones, the administrator of his estate. Sarah Pierce, the appellee, is the mother of the deceased. The deceased died intestate, as alleged, in 1862, leaving his mother, his only surviving parent, and said Lydia, his widow, but leaving no issue or the

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descendants of issue surviving him. He left a considerable estate, real and personal, which, if he died intestate, was inherited by his widow and his mother. The widow claimed to be the owner of three-fourths of the estate, and conceded that the mother was the owner of the other one-fourth, if the deceased died intestate. The parties had united in conveying certain real estate which they thus inherited, and the widow had received three-fourths and the mother one-fourth of the proceeds. The widow had also, as was alleged, received and retained rents of real estate, and large amounts of money from the administrator, while he had failed to pay any part of the money to the plaintiff. The plaintiff claimed that she was entitled to one-half of the estate, and made her demand upon the administrator that he pay the same to her, which he refused to do, and wholly refused to recognize her claim, etc. The object of the action was to settle the respective rights of the parties in the estate, and to compel an accounting accordingly. The action was commenced June 6th, 1867.

In addition to a denial of the complaint, the defendants set up a claim to the whole of the estate in favor of the widow and one Antha Kellogg, who had been raised by said Pierce, although not adopted according to law. This claim was based on an alleged nuncupative will which it was averred had been made by the deceased, when a soldier of the United States in the war to suppress the rebellion, just as he was upon the point of leaving home in such service, and while in possession of the property set forth in the complaint; that he then verbally published as his will, in case of his death in said service, that all his property should descend to, and be equally divided between, said defendant and said Antha Kellogg; that said Pierce immediately thereafter died in said service, while a soldier as aforesaid.

It may be considered, first, whether the alleged nuncupative will is valid or not; and, second, if it is not valid, what are the legal rights of the parties in the estate?

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The evidence relating to the nuncupative will was as follows:

William B. Brittingham testified: "I was a resident of Lafayette in 1862, and engaged in the practice of medicine; I knew the deceased from 1858 until his death, and was his family physician from 1859, and was otherwise intimate with him; he came to my office to read his newspapers and private papers almost daily, for six or eight months before his death; he enlisted on the 21st day of July, 1862, as nearly as I can recollect the date; at all events, it was on the Monday the company left Lafayette, Indiana; this was G. S. Orth's company; he told me he had enlisted, and I saw him start away in the ranks afterward; he came to my office about 11 o'clock on the Monday morning referred to; he stated to me that he had enlisted and was going to the front immediately, and wished to place some matters in my hands to look after; he said he wished me to say to his wife that he wanted Antha, his adopted daughter, now Mrs. Ridgely, to have the half of his property; he explained himself by saying he wanted his wife and Antha to have all his property; it belonged to them, and they had the right to it; he came to me as an old friend, not knowing that he would ever see them again; wished me to see this matter executed, and to go and tell Mrs. Pierce, in case of his death; he said that he had a presentiment that he would never come back alive; I told him I did not want to take the responsibility of it; that he had better make this in writing; his answer was this, that the property belonged to them, and that there could be no trouble; also, that he had not time to do it; I made a minute of it at the time on a piece of paper; I think I have never looked at it from that time to this; I have not given his exact words, but this is the substance of it; he also requested me to look after his wife, and advise her as to property, and to see that his adopted daughter was properly protected; he left the same day about noon, I think on the Indianapolis railroad, in G. S. Orth's company, to go to the front and help defend Kentucky.

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Samuel A. Huff testified, that he had been well acquainted with the deceased; that on the morning of Sunday the 20th day of July, 1862, a telegram was received at Lafayette from Governor Morton, announcing an invasion of Indiana, by rebels who had crossed the Ohio, and calling for volunteers; this telegram produced great excitement in Lafayette; it was read in the churches during morning service, and in the course of the afternoon a public meeting was held at the court-house, at which two companies of volunteers were organized, one commanded by the witness, and one by G. S. Orth; these companies left the next morning about seven o'clock for Indianapolis, and the witness recollects being in the same car with the deceased, in going thither; the two companies were sworn into the United States service the same day at Indianapolis, and at once proceeded to the Ohio river by railroad. He was informed subsequently that on Tuesday, the day after they left Indianapolis, the deceased was accidentally drowned in the Ohio river, having missed the gangway in going on or off the boat, which was being used by the company; he belonged to Captain Orth's company. The excitement in Lafayette connected with the organization of these companies lasted throughout the entire Sunday, and up to the time of departure next morning; a large multitude accompanied the volunteers to the cars as they left.

Mark Jones testified that he knew the deceased during his lifetime, and that he remembers meeting him on the morning of the 21st of July, 1862, about half past seven o'clock, on Main street in Lafayette, and that deceased then told him he had enlisted in Captain Orth's company, and was then on his way to the cars to go with his company to Indianapolis.

The sections of the statute bearing on the question are sec. 20, p. 555, and sec. 21, p. 556, 2 G. & H. They read as follows:

"Sec. 20. No nuncupative will shall be valid when more than the value of one hundred dollars is bequeathed, nor

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unless it be made in the last sickness of the testator, and the subject thereof is reduced to writing within fifteen days after it shall have been declared and proved by two competent witnesses, who shall have heard the testator in effect request some of those present to bear witness thereto, and no such nuncupative will shall be proved after six months from the death of the testator, nor until his widow and heirs shall have reasonable notice of the time and place of proving the same.

"Sec. 21. Nothing contained in this article shall prevent any soldier, in actual military service, nor any mariner, at sea, from disposing of his personal estate, in his actual possession, and his wages, by a nuncupative will."

The language of both of these sections evinces an intention on the part of the legislature to restrict nuncupative wills to cases falling clearly within the reasons of the statute. Under section 20, property bequests cannot exceed one hundred dollars in value. The will must be made in the last sickness of the testator. It must be reduced to writing within fifteen days after it shall have been declared, and must be proved by two competent witnesses, who must have heard the testator, in effect, request some of those present to bear witness thereto. It cannot be proved after six months from the death of the testator, nor until his widow and heirs have had reasonable notice of the time and place of proving the same.

Counsel for appellant concede that under section 20 the will cannot be upheld, but claim that it is valid as a soldier's will under section 21.

Two classes of persons are authorized to make a nuncupative will by section 21; soldiers, in actual military service, and mariners, at sea. These persons may dispose of their personal estate, in their actual possession, and their wages, by nuncupation. Was the deceased in this case in actual military service? In *VanDeuzer v. The Estate of Gordon*, 39 Vt. 111, the soldier in September, 1862, enlisted and joined his company and regiment in camp at Worcester,

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Mass., was then mustered in, and soon after, while still there, wrote and signed an instrument which was defectively executed as a will, but intending the same to be his last will and testament, provided he died during his term of enlistment. Before the expiration of his term, he died without having been discharged or mustered out. It was held, that the soldier was not in actual military service, and that the will was not valid as a soldier's will. WILSON, J., in delivering the opinion, said: "The term service, in its general sense, embraces all the details of the military art. In this sense of the term Gordon was in military service at the time he wrote and signed the instrument. He was subject to all the laws and regulations for the government of a soldier who had enlisted for the purpose of joining a certain company and regiment. He was in camp under instruction in military drill and discipline, and performing such other service as might be required of a soldier before his company and regiment were accepted and mustered into the principal service for which they were to be organized. The term service, in its restricted sense, is the exercise of military functions in the enemy's country in the time of war, or the exercise of military functions in the soldier's own state or country in case of insurrection or invasion, and in this sense the words of the statute, 'actual military service,' should be understood. The exception of the statute, in respect to soldiers' wills, is founded upon the necessity of the case. It is limited to cases where from the actual or supposed situation of the soldier he is exposed to the perils incident to actual warfare. It is clear that such was not the situation of Gordon at the time he made the instrument, and that he was not in condition while at Worcester to make the soldier's will." In the case cited, Gordon had been regularly mustered into the military service of the United States, while in the case under consideration the deceased had not been so mustered. Judge Huff testifies that he was sworn into the service of the United States after reaching Indianapolis, on the day after the supposed nuncupative will was made.

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In *Leathers v. Greenacre*, 53 Me. 561, the facts were, that Leathers enlisted in the First Maine Regiment of Cavalry, and was mustered into the service of the United States in August, 1862, and continued in the service until his death, which took place at Richmond, where he was held a prisoner by the rebels, March 16th, 1864. A few days after his enlistment, and before he left the State of Maine, he entrusted to the defendant two promissory notes, payable to himself, with written directions to collect them and let any one of his friends who needed them most have the proceeds, in case he gave no further directions. Afterward, when he was at Stafford Court-House, in Virginia, on the 6th of March, 1863, he wrote a letter to the party with whom he had left the notes, making a different disposition of them or their proceeds. In deciding the case, the court say: "Doubtless if Leathers had written this letter after he had been mustered into the service of the United States, but while he remained in barracks at Augusta, or while thus quartered at any permanent military depot or station in one of the loyal states not exposed to the incursions of the enemy, before he had crossed over into Virginia with his regiment to take part in the hostilities existing there, and before he had begun to move under military orders against the foe, we should feel bound to say that this was no valid will and that it is not entitled to probate as such.

"But having marched into the enemy's country, from which he never returned, being encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters, and not at the time of writing occupied with any present movement of the troops, but was apparently on some service detached from his own regiment, we cannot say that he was not a soldier in actual service, engaged in the great expedition which cost so many lives, but which after long delays resulted in re-establishing the authority of the government over the revolted states. The term expedition is not to be confined to that movement of the troops which

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immediately precedes the actual conflict and shock of battle." See, also, *Gould v. Safford's Estate*, 39 Vt. 498.

In 1 Redfield on Wills, 190, it is said: "The privilege extended to soldiers being limited to such as are 'in actual military service,' questions have sometimes arisen as to what is implied by these terms. The rule of the English ecclesiastical courts is, that it was intended to include only such as are on an expedition, or, in the language of the Roman law, '*in expeditione*.' Hence it has been there decided, that the will of a soldier quartered in barracks, either at home, or in the Colonies, is not within the concession. And the same rule was applied to an officer, while in command of one of the divisions of the army in the East Indies, and who died whilst on a tour of inspection of the troops."

Counsel for appellant refer to the case of *In the Goods of George Thorne*, 11 Jur., N. S. 569, as an authority in point in favor of the allowance of the will in this case. Thorne was a captain in the regular army, in the 4th West India Regiment of Infantry, and by order of the military authorities proceeded with his regiment to the Gold Coast, Africa, to join an expedition intended to march into the interior against the king of Ashantee; before the expedition had actually started from the British settlement, he wrote a testamentary paper, but did not execute it in the presence of two witnesses. It was held, that the testator was at the time on actual military service, and that the paper must be admitted to probate. This case is clearly distinguishable from that which we are considering. There the deceased was an officer in the regular army, had been and was in regular military service, and was about to engage in an expedition against the enemy. Here the deceased was not in the military service of the United States. He had not taken any steps which made him a soldier in any proper sense of the word. Had he refused to be sworn on arriving at Indianapolis, he could not have been considered bound by anything which he had done, nor compelled to be sworn or to enter into actual military service. We are of the opinion, then,

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that he was not only not in actual military service, but that he was not even a soldier while yet at Lafayette, within the meaning of the statute in question.

A portion of the estate of Pierce was real estate. By the section of the statute in question, only personal property can pass by a soldier's will. See, also, *Palmer v. Palmer*, 2 Dana, 390; *McLeod v. Dell*, 9 Fla. 451; *Smithdeal v. Smith*, 64 N. C. 52.

A question not discussed arises, and that is, whether, if this alleged nuncupative will had been made under such circumstances that it might have been admitted to probate, it must not, like any other will, have been admitted to probate in the proper court before it could be pleaded or used in evidence as a will.

And again, it is only the personal estate, in actual possession of the soldier, which he can dispose of by nuncupation. The personal estate which it is claimed the deceased bequeathed in this case consisted of goods, wares, merchandise, moneys, notes, accounts, and other choses in action. Although these were, in one sense, in the possession of the deceased at the time, it may be a question whether they were in his "actual possession," within the meaning of the statute. We need decide nothing on this point, however.

The next point is, what are the legal rights of the parties in the estate? The question here may be stated as follows:

By section 25 of the statute of descents of 1852, 1 G. & H. 296, three-fourths of the property in this case would have descended to the widow. But by an act approved March 4th, 1853, Acts 1853, p. 56, sec. 3, the above section 25 is so amended as to divide the estate equally between the widow and mother. Until the spring of 1867, it was believed among the profession that the amendment of 1853 was unconstitutional, because it failed to recite the section amended. The administrator, Jones, conducted his distribution of the estate accordingly under the act of 1852. On the 9th of March, 1867, the act "for the repeal of statutes not in conformity with the ruling of the Supreme Court in the

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case of *Langdon v. Applegate* and others, and limiting actions arising out of the same," etc., was approved and became a law. 3 Ind. Stat. 573. It was followed in the ensuing November by the decision of this court in the case of *The Greencastle Southern Turnpike Co. v. The State, ex rel. Malot*, 28 Ind. 382, establishing the constitutionality of the above act of 1853. Before the three months' limitation provided by the act of 1867 expired, suit was brought in the present case by the appellee to recover her full half interest in the estate of her deceased son.

The point made by counsel is, "that when the decision in *Langdon v. Applegate*, 5 Ind. 327, declared the unconstitutionality of the act of 1853, and acts of like form, the same stood abolished, and private rights obtained their *status*, and became vested as if such unconstitutional and void acts had never been passed."

It is understood that the reason for the passage of the act of March 9th, 1867, was, that the judges of the court then on the bench had come to the conclusion that the ruling of the court in *Langdon v. Applegate* was wrong, and that by the enactment of that law much of the mischief which would result from overruling that case, and those which had followed it, would be prevented. The consequence of the overruling of these cases was, that the statutes which, according to the rulings therein, would have been held unconstitutional, were valid, not from the time of overruling those cases, but from the time of their enactment until they were repealed. It was not the overruling of those cases which gave validity to the statutes; but the cases having been overruled, the statutes must be regarded as having all the time been the law of the State. This court has no power to repeal or "abolish" statutes. If it shall hold an act of the legislature unconstitutional, while its decision remains, the act must be regarded as invalid. But if it shall afterward come to the conclusion that its former ruling was erroneous, and overrule it, the statute must be regarded for all purposes as having been constitutional and in force from the begin-

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ning, and the rights of parties must be determined accordingly. The act of March 4th, 1853, having been valid, and the deceased having died while it was in force, his estate must, according to its terms, be divided equally between his widow and his mother. It will be understood, we presume, that we decide the case upon its own facts. The parties claiming the estate each assert a claim by virtue of the statute of descents. We decide nothing as to what would be the rule, had the parties to whom the estate descended conveyed the same before the case of *Langdon v. Applegate* was overruled, and had the purchaser been the party asserting a claim.

The judgment is affirmed, with costs.

**THE BOARD OF COMMISSIONERS OF CLAY COUNTY ET AL. v.
MARKLE ET AL.**

INJUNCTION.—*Motion to Dissolve Temporary Injunction.—Harmless Error.*

The overruling of a motion to dissolve a temporary injunction, where no appeal is taken from the order overruling such motion, even if error, becomes harmless and presents no question for determination, after the cause has been tried and a perpetual injunction granted.

SAME.—*Complaint.—Verification.*—No verification of a complaint is required to enable a court to grant a perpetual injunction on the final hearing of the cause.

CONSTITUTIONAL LAW.—*Relocation of County-Seat.*—Section 1 of the amendatory act in reference to the relocation of county-seats (3 Ind. Stat. 171) is constitutional.

SAME.—*Title of Statute.*—Where the title of a statute recited that it was to amend section 1 of a certain act, and also section 1 of an act amendatory of said former act, a reference in the body of said statute to "section 1 of the above recited act" was held to mean section 1 of said amendatory act, and not section 1 of said amended act, which, having been once amended, was no longer in existence, and therefore was not subject to amendment.

INJUNCTION.—*Right of Tax-Payers to Enjoin.*—Any tax-payer of the county may maintain an action to enjoin the county commissioners from doing illegal acts, and transcending their lawful powers, when the effect would be to impose upon such tax-payer an unlawful tax, or to increase his burden by taxation.

46	96
125	498
127	20
128	308
129	96
130	411
130	520
131	438
132	335
133	112
134	96
141	22
141	653
142	515
142	519
143	321
143	356
144	85

46	96
155	388
155	495
156	209

46	96
160	450
165	271

46	96
169	369
169	375

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JURISDICTION.—*Superior and Inferior Courts.—Intendment.*—Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.

SAME.—*Decision of Inferior Court on Jurisdictional Fact.—Conclusive.*—When the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive.

STATUTE CONSTRUED.—*Relocation of County-Seat.—Petition for Relocation.*—The act of February 24th, 1869, 3 Ind. Stat. 171, in reference to the relocation of county-seats, does not require that it shall be stated in the petition that the requisite number of voters have signed it; but it must contain the requisite number, and the deed must be executed, conveying a good title to two sites for a court-house and jail, and the two hundred and fifty dollars must be paid, before the order for relocation can be made or the new county buildings erected.

SAME.—*Board of Commissioners.—Jurisdiction.*—The board of commissioners cannot decide upon the petition, or the number of legal voters petitioning, until it is presented, or upon the title to the land until the conveyance has been executed and delivered or offered, or whether the petitioners have deposited the requisite sum of money, until it has been paid or offered to the board. When these things have been done, the board must ascertain and determine these questions, and the right to hear and determine these questions is jurisdiction.

SAME.—*Legal Presumptions.*—The board of commissioners having acquired jurisdiction to hear and determine the matter of the petition and all questions arising under it, the Supreme Court must presume in favor of the regularity of the proceedings, and that whatever was done in deciding questions arising in the case, and in acting upon them, was done regularly and upon due proof, unless the contrary appears in the record.

JURISDICTIONAL FACTS.—The facts which must be shown to exist before a matter can be within the jurisdiction of an inferior court, and which can be inquired into collaterally, are such that in the absence of them the court cannot rightfully hear and determine any question touching the matter in controversy.

SAME.—Whenever it is admitted, either in the pleadings or otherwise, or shown by proof, that such facts did exist, that the proper steps had been taken, such as the filing of an affidavit, petition, or other papers, authorizing the court to act, to make an investigation and decision, then the jurisdictional facts exist.

JURISDICTION.—*Inferior Court.—Presumption.*—When the jurisdiction of inferior courts is once established, then all presumptions and intemds in favor of their proceedings and decisions apply to them as well as to courts of general jurisdiction.

INJUNCTION.—The fact that no appeal lies from a decision affords no ground for an injunction to restrain action under the judgment, or for setting it aside.

SAME.—When the board of commissioners have made an order relocating the county-seat; under the statute, they cannot be enjoined from letting a contract for the construction of new county buildings, on the ground that the architect has

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not made a plan and estimates for a jail, and that none are on file in the auditor's office, or that the plan for the court-house is imperfect, and that the estimated cost of the same is more than fifteen thousand dollars.

From the Clay Circuit Court.

G. A. Knight, S. W. Curtis, and F. M. Compton, for appellants.
W. W. Carter and S. D. Coffey, for appellees.

OSBORN, J.—This was an action brought by the appellees against the appellants, the object of which was to prevent the relocation of the county-seat of Clay county, and to enjoin the board of commissioners from letting a contract for the erection of a court-house and jail at the proposed new county-seat. The complaint was in two paragraphs. The plaintiffs annexed an affidavit to the complaint that the allegations therein were true as they verily believed.

A temporary injunction was granted, as prayed for. Afterward the appellants moved the court to dissolve the injunction. Amongst the reasons stated for the motion was one, that the complaint was not sufficiently verified, and that the affidavit attached to the complaint was insufficient and not positive in form. They also filed separate demurrers to each paragraph of the complaint, on the ground that neither paragraph contained facts sufficient to constitute a cause of action; and, second, that the court had no jurisdiction of the subject of the action. The plaintiffs then by leave of the court, and over the objections and exceptions of the defendants, filed a new affidavit, in which it was stated positively that the allegations in the complaint were true. The motion to dissolve the injunction, and the demurrers to the complaint, were then overruled to which rulings the appellants excepted.

An answer of two paragraphs was filed to the whole complaint. A demurrer to the second paragraph of the answer for want of sufficient facts to constitute a defence to the action was sustained, and an exception taken.

The first paragraph was a general denial. The cause was tried by the court, who found that each and every allegation

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of the complaint was true, and that the plaintiffs were entitled to the relief asked for, and, over a motion for a new trial, rendered a judgment perpetually enjoining the defendants, and each of them, and the Board of Commissioners of Clay County and their successors, from taking any further steps looking toward the relocation of the county-seat as proposed by the board, and from letting or proceeding to let or make any contract for the building of a new court-house or jail upon the sites proposed, and for costs against the board of commissioners.

Seven errors are assigned. The first and third relate to the action of the court in allowing the appellees to file an additional affidavit in support of the complaint, and in overruling the motion to dissolve the temporary injunction.

The second is, that the court erred in overruling the demurrer to the complaint.

The fourth is, that it erred in sustaining the demurrer to the second paragraph of the answer; the fifth, that it erred in overruling the motion for a new trial; the sixth, that the complaint does not state facts sufficient to constitute a cause of action; the seventh, that the circuit court had no jurisdiction over the subject of the action.

If an appeal had been taken from the order overruling the motion to dissolve the injunction, the ruling of the court in allowing the additional affidavit to be filed, and overruling the motion to dissolve the injunction, would have been before us for review. 2 G. & H. 277, sec. 576. But where an appeal is not taken until after final trial and judgment for the plaintiff, and a perpetual injunction is granted, the error, if any, in refusing to dissolve a temporary injunction becomes harmless and presents no question for the determination of this court. It would be idle to reverse the order overruling a motion to dissolve a temporary injunction, after a trial of the action and decree for a perpetual injunction in the case.

No verification of the complaint was required to enable the court to grant a perpetual injunction on final hearing of the cause. *The Sand Creek Turnpike Co. v. Robbins*, 41 Ind. 79.

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The fifth error raises no question. The causes for a new trial, as stated in the motion, all relate to the action of the court in overruling the motion to dissolve the temporary injunction and in overruling demurrers to the complaint and sustaining a demurrer to the second paragraph of the answer. The sixth and seventh present no question not involved in the second.

The action was brought by nine persons against the Board of Commissioners of Clay County and the three members composing the board. In the first paragraph, it is alleged, that the plaintiffs are *bona fide* residents, citizens, voters, and tax-payers of the county; that John G. Ackelmire and others presented a pretended petition to the board of commissioners, asking the relocation of the county-seat of the county to a place and site therein set forth; the presentation and depositing of a deed with the board, which purported to convey to the county, with covenants of warranty, two parcels of land, one as a site for the court-house, the other for a county jail, corresponding with the description of the two sites in the petition. It is also averred that the grantors had no title to the land described in the deeds, and the county has none; that notwithstanding the defective title to the land, the commissioners, at the regular September session of the board, pretended to entertain and hear the petition, and receive as valid the pretended conveyance, without right and without jurisdiction, and made an order of record, appointing an architect to make out plans, specifications, and estimates for a court-house and jail; and that the board made other orders, looking toward the removal of the county-seat from its present location to the site specified in the petition, a distance of fourteen miles. Copies of the petition and all the orders and proceedings of the board were filed and made parts of the complaint. It is then averred that the board failed and refused to require an abstract of title to the land conveyed, and failed and refused to examine and investigate the title to the land or hear proofs showing that the title was defective.

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In the second paragraph, the same averments are made as to the presentation of the petition and the deed. It is also alleged that the petitioners gave to the board two hundred and fifty dollars in money to pay an architect; that the board made an order relocating the county-seat, as prayed for in the petition, appointed an architect to make plans for the court-house, and passed an order, and took other steps for finally relocating the county buildings according to the prayer of the petitioners, and the erection of the court-house and jail, and the removal of the public records and archives of the county to such new county-seat. Copies of the petition and all the orders, notices, and proceedings of the board are filed with and made parts of the paragraph. It is further averred that the board failed and refused to investigate the title to the real estate conveyed for the sites for a court-house and jail and failed and refused to count the number of petitioners for the relocation, and that the number thereof, at the time of making the several orders of the board, was by the board wholly unknown; that the county commissioners had no jurisdiction to pass any of the orders, because there was not, and the board did not find that fifty-five per cent. of the legal voters of the county had signed the petition; that the board did not find how many votes had been cast for candidates for Congress at the last preceding election, or the number of legal voters that it was necessary should petition for the relocation, or any other facts necessary to enable them to pass any of the orders, or do any of the acts touching the removal, and that the record of the proceedings of the board does not show any such finding. The defect in the title to the real estate described in the deeds is specifically pointed out. It is alleged that the estimate of the cost of the court-house, as made by the architect selected by the board, was at least twenty thousand dollars, and that the petitioners for the change had not requested the erection of buildings to cost more than fifteen thousand; and that the plan and specifications adopted for the court-

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house are so imperfect as not to be understood. In both paragraphs, it is alleged that the county commissioners will make the relocation and cause the construction of the court-house and jail, and the removal of the public records, etc., greatly to the damage of the plaintiffs, if they are not restrained by injunction. Prayer for an injunction in the usual form.

We do not consider it necessary to set out the averments in the second paragraph of the answer, because in our opinion all the facts alleged in it were admissible in evidence under the general denial. The only questions before us are those arising under the second assignment of error, in overruling the demurrer to the complaint.

It is insisted by the appellees that the first section of the act of February 24th, 1869, 3 Ind. Stat. 171, is unconstitutional; that all the proceedings for the relocation of the county-seat were predicated upon, and taken under, that section, and that consequently they are all void.

The original act authorizing the relocation of county-seats was approved March 2d, 1855. 1 G. & H. 194. The first and second sections of that act were amended by an act approved December 18th, 1865. Acts of Special Session 1865, p. 194. The second section of the act may be found in 3 Ind. Stat. 170. On the 24th of February, 1869, an act was approved, entitled "an act to amend sections 1 and 3" of the act of March 2d, 1855, and "section 1" of the act of December 18th, 1865. By the original section 1, as well as by the amendment to it by the act of 1865, two-thirds of the legal voters of the county were required to petition for the relocation of the county-seat before the board of county commissioners could make the removal. By section 1 of the act of 1869, only fifty-five per cent. of the legal voters were required.

The objection to the last named act is, that the title is to amend a section which had been already amended, and no longer in existence, as well as one in force, whilst in the body of the act, the language is in the singular number, "that

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section 1 of the above entitled act be and the same is hereby amended," etc., and that the words "above entitled act" refer to the act of 1855 and none other.

Section 1 of the act of 1855 was amended by section 1 of the act of 1865, and was no longer the subject of an amendment, and the apparent attempt to include it in the act of 1869, by mentioning it in the title, was unavailing. *Draper v. Falley*, 33 Ind. 465. The title does properly mention the title and section 1 of the act of 1865. We think it more reasonable to hold that the General Assembly intended to amend the section of the law in force, rather than one for which it had been substituted. There being no such section in existence, the mention of it in the title might properly be disregarded in the body of the act. Our conclusion is, that the reference in the body of the act is to section 1 in the act of 1865, and that section 1 of the act of 1869 is constitutional and in force.

The appellants say that the demurrs to the complaint ought to have been sustained, because the contemplated injury would be to the appellees, in common with other taxpayers, citizens, and voters of the county, and that courts of equity will not enjoin the commission of an injury at the suit of one of the parties, under such circumstances, and only when the threatened injury will be special to the party asking the injunction. *Doolittle v. Supervisors, etc.*, 18 N. Y. 155, sustains the positions of the appellants. Other authorities hold the same doctrine. The rulings on the questions are not uniform. In some of the states, injunctions are granted in actions by an individual to restrain municipal officers from doing illegal acts, and from transcending their lawful powers, when the effect would be to impose upon him an unlawful tax or to increase his burden by taxation.

Judge DILLON, in his work on municipal corporations, considers the question quite fully, and says if the ordinary principle, which obtains as to public nuisances, is applied, it must be admitted, when the duty about to be violated by the corporation or its officers is public in its nature, and affects

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all the inhabitants alike, that one not suffering any special injury cannot in his own name, or by uniting with others, maintain a bill to enjoin. The reason urged against it is, that if one can maintain such an action, an indefinite number may do the same. He says: "To allow the taxable inhabitant to maintain a bill for an injunction, to prevent illegal expenditures or appropriations of money, has the advantage of directness and simplicity, and, notwithstanding its departure, or apparent departure, from technical principles, has had the quite general, but not uniform, approval of the courts in this country; and practically, this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit, which, when, judicially settled, in effect settles the question in controversy." Sec. 736. And again he says: "Much more clearly may this be done when the right of the public officer of the State to interfere is not admitted, or does not exist." Sec. 736a. The action is regarded in the nature of a public proceeding to test the validity of the acts sought to be impeached. In New York, and perhaps other states, the attorney general is authorized to institute and carry on actions for such purpose.

It has been settled in this State that the remedy may be had by any tax-payer in his own name. *The City of Lafayette v. Cox*, 5 Ind. 38; *Oliver v. Keightley*, 24 Ind. 514. In *Harney v. The Indianapolis, etc., R. R. Co.*, 32 Ind. 244, the question was made, that the plaintiff as a tax-payer had no such interest in the funds of the county as would enable him to maintain a suit to prevent an unlawful appropriation thereof. This court held that the action could be maintained, and said that it was a common remedy in this State, and had been sanctioned elsewhere. That was an action to restrain the county from making an unlawful subscription and donation to a railroad company. In *English v. Smock*, 34 Ind. 115, this court held that the injunction ought to have been granted, restraining the board of county commissioners from negotiating the county bonds, at the suit of a part of

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the tax-payers. In *Noble v. The City of Vincennes*, 42 Ind. 125, it was held that the city council might be restrained, under certain circumstances, from passing an ordinance to aid in the construction of a railroad. In this, like all the other cases, the action was instituted, and the extraordinary remedy sought, by one or more tax-payers, in his or their own names. In some of them, the doctrine now contended for was not mentioned. See *The City of New London v. Brainard*, 22 Conn. 552; *Scofield v. Eighth School District*, 27 Conn. 499. The same has been held in Iowa; *Rice v. Smith*, 9 Iowa, 570, which was to enjoin the erection of a court-house at a place which was not the county-seat of the county. In Illinois; *Colton v. Hanchett*, 13 Ill. 615. In Maryland; *The Mayor, etc., of Baltimore v. Gill*, 31 Md. 375. In New Hampshire; *Merrill v. Plainfield*, 45 N. H. 126. In many of the cases which we have examined, the question was made and passed upon, and in others the right to maintain the action by the individual was recognized without any question. In *The Mayor, etc., of Baltimore v. Gill*, *supra*, the point was made, and the right maintained by the court and many authorities reviewed and criticised. The distinction between an action to prevent a nuisance, unless the party may suffer some special damage, and one to prevent an act which will increase his burdens by illegal taxation, is pointed out. In the former, he has no other than an interest in common with others, whilst in the latter he has a special interest in the matter, distinct from that of the general public.

It is also claimed by the appellants that the averments in the complaint show that all the questions sought to be raised had been settled by the board of county commissioners, as appeared by the record of the proceedings filed with the complaint. They admit that the board was an inferior tribunal, but they say: "When the jurisdiction of an inferior court of special and limited statutory jurisdiction depends upon a fact which such court is required to ascertain, and settle by its decision, such decision is conclusive, except in a direct proceeding to reverse or set aside the judgment."

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The appellees do not deny the general proposition of law laid down by the appellants. They say, however, that all jurisdictional facts must appear on the face of the record, and that the record must show the finding of the court upon all such facts, or its acts will be *comm non judice*, and they insist that the record fails to show a finding of any of the jurisdictional facts in this case.

As the decision of the case depends mainly upon this question, we have given it careful consideration, and find a complete reconciliation of the many rulings affecting it impossible. Whilst there are certain principles, recognized by all courts as fundamental, we find so many apparent exceptions and inconsistent rulings in the cases decided, that it is somewhat difficult to say what fixed and certain rules they establish as guides which can be followed in each case. The proposition that "the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged" (*Peacock v. Bell*, 1 Saund. 73), is recognized by all the authorities as correct. So the rule that "when the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive," is just as well established. *The Evansville, etc., R. R. Co. v. The City of Evansville*, 15 Ind. 395. These two propositions are sustained by numerous decisions. Indeed, there does not seem to be any controversy about them. The difficulty is to determine when jurisdiction attaches and just what the record must show to establish and make it conclusive. It is here that we meet the apparent conflicts in the rulings of courts. An examination of the decisions will be found interesting and useful to any one who has never carefully looked through them. But to review them would require a treatise, and their citation even would be out place and unnecessarily extend this opinion. A reference to many can be found in vol. 2 of

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Philipps' Evidence (Cowen & Hill's and Edward's Notes), under the title, "The admissibility and effect of judgments of inferior courts;" and 1 Smith's Leading Cases, *Crepps v. Durden*. We shall only notice a few of such as we think directly applicable to the case under consideration.

Section 1 of the act of February 24th, 1869, 3 Ind. Stat. 171, provides, "that whenever fifty-five per cent. of the legal voters of any county in this State shall, by written petition, request the board of commissioners of their county to relocate the county-seat of such county, designating in such petition the site where such relocation is desired, and shall procure the conveyance to such board by deed, conveying good title of two lots of ground, one containing not less than two acres as a site for the court-house, and the other containing not less than one-fourth of an acre as a site for the county jail, to be held by such board for that purpose, and shall deposit with such board the sum of one hundred dollars to pay an architect, and one hundred and fifty dollars to pay commissioners to assess damages; then such board shall proceed to have new county buildings erected thereon, and the county-seat removed thereto, in the manner and upon the conditions set forth in the following section."

Sec. 2, 3 Ind. Stat. 170, provides that when such petition is presented, and the affidavit of one or more persons filed, stating that the signatures to such petition are genuine, and that the petitioners are legal voters of such county, which affidavit shall be *prima facie* evidence that the facts so stated are true, and said money deposited, then said board shall at once employ a competent architect to prepare plans, specifications, and estimates suitable for new county buildings, the buildings to be of brick or stone, and the new county offices to be fire-proof, or as nearly so as practicable, the cost of the whole not to exceed fifteen thousand dollars, unless requested by the petitioners, and such plans, specifications, and estimates shall be presented to the board at its next session: Provided, that the number of votes at the congressional election next preceding the presentation of

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such petition to the board of commissioners, with ten per centum added thereto, shall be considered the whole number of votes of such county. Authority is given to any person to appear and defend against the application and controvert any of the facts which the applicants are bound to prove.

In this case, the record of the board of county commissioners shows that a petition addressed to the board was filed before them, in which the petitioners represented that they were legal voters of Clay county, and respectfully asked for the relocation of the county-seat of that county at the town of Brazil, and that the court-house be erected upon a site described, containing two acres, and the county jail upon a site described, containing a quarter of an acre, for which purpose they tendered a warranty deed, purporting to convey a good title. They also tendered two hundred and fifty dollars to pay an architect and the commissioners, "as indicated in section 1 of the act of February 24th, 1869." The petitioners asked that the board take the necessary steps to accomplish the object of the petition. The number of the petitioners is not stated, but the copy in the record shows the names of two persons as signers, followed by the words, "and others."

Three citizens and voters of the county appeared and defended against the petition. The defendants filed an answer, and the petitioners filed a reply. A trial was had before the board. After witnesses had been examined on both sides, the answer was withdrawn, and, by agreement, the cause was submitted for final determination upon the motion made by the defendants to dismiss the application, "for the reason that the title deed filed in this case, for the purpose of conveying title to the county," for a court-house and jail did not convey a good title, and that to act on it would involve the county in endless litigation and expense. The board then made the following order:

"Which motion, after argument of counsel, the court overrules; and no further defence being made by defendants, the court grants the order for the relocation, as prayed for

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in said petition and postpones further action herein until Monday, September 11th, at 8 o'clock A. M., to which time this cause stands continued."

The board afterward made an order appointing an architect, and directed the auditor to notify the governor of the filing of the petition.

The petitioners filed the plans, etc., of the architect appointed by the board; also, a note to secure the payment of the value of the real estate belonging to the county at the old county-seat; which were accepted by the board. The board also ordered the auditor to advertise for bids for the erection of the court-house and jail at the new sites.

Several motions and objections were made, and bills of exception filed before the board, which it is not necessary to set out or particularly mention. But no other entry or record of a finding or order was made than the one on the motion to dismiss the petition, and which is copied above.

The complaint admits that a petition was filed such as the statutes requires, except as to the number of petitioners; that a deed for the sites for the court-house and jail was executed and given to the county board, which was sufficient to vest the title to the land in the county, if the title had been in the grantors, and that plans and specifications for the court-house were prepared and accepted by the board, and that the board, after hearing evidence on the question, passed an order for the removal of the county-seat. The record of the board produced by the appellees fully establishes these matters. What the appellees deny is, that the petition contained the names of fifty-five per cent. of the legal voters of the county, and that the deeds did, in fact, vest a good title to the land in the county. They also deny that the board made a proper finding.

The statute does not require that it shall be stated in the petition that the requisite number have signed it. It must contain the requisite number. The deed must be executed, conveying good title to the two sites for a court-house and jail, and the two hundred and fifty dollars must be paid before:

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the order for relocation can be made, or the new county buildings erected. The board cannot decide upon the petition or the number of legal voters petitioning until it is presented, or upon the title to the land described in the deed until the conveyance to the board has been executed and delivered or offered, or whether the petitioners have deposited the sum of money required, until it has been paid or offered to the board. When, however, these things have been done, the board must ascertain and determine those questions. If the petition contains the names of fifty-five per cent. of the legal voters of the county, and if the deed offered conveys a good title to the sites designated in the petition for the court-house and jail, and the requisite sums of money have been deposited with the board, then the board must proceed to have the new county buildings erected and the county-seat removed, and not before. The right to hear and determine these questions is jurisdiction. The power to hear and determine a cause, is jurisdiction. *Grignon's Lessee v. Astor*, 2 How. 338. Any movement of a court is necessarily jurisdiction. *Dequindre v. Williams*, 31 Ind. 444. "If the law confers the power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." *The State of Rhode Island v. The State of Massachusetts*, 12 Pet. 657.

The power to hear and determine the question gave the power to determine any or all of them, wrong as well as right. "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other court." *Elliott v. Peirsol*, 1 Pet. 340; *Voorhees v. The Bank of the U. S.*, 10 Pet. 449. "Courts are established for the purpose of administering justice, and it is their duty, so far as they can discover the truth, to decide right. But the power to decide at all necessarily carries with it the power to decide wrong as well as

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right. In the present imperfect state of human knowledge, a power to hear and determine necessarily carries with it a power which makes the determination obligatory, without any reference to the question whether it was right or wrong. If this were not so, the judgment or determination of any court would be of no particular value. It might be attacked or avoided at pleasure, upon the ground that the court or judge had committed an error." *Snelson v. The State*, 16 Ind. 29.

The facts which it is said must be shown to exist before the matter can be within the jurisdiction of an inferior court, and which can be inquired into collaterally, are such as, in the absence of which, the court can not rightfully hear and determine any question touching the matter in controversy. Hence a recital in the record of such facts may be shown to be false, and some courts hold that they are not even *prima facie* evidence of the truth, but that they must be proved by evidence *aliunde*. But, whenever it is admitted, either in the pleadings or otherwise, or shown by proof, that such facts did exist, that the proper steps had been taken, such as the filing of an affidavit, petition, or other papers, authorizing the court to act, to make an investigation and decision, then the jurisdictional facts exist. The whole question begins and ends here. "To investigate and decide" is but another phrase, meaning the same thing as to "hear and determine." This was recognized in *The State, ex rel. Waggoner, v. Needham*, 32 Ind. 325, where the county commissioners acquired jurisdiction by the filing of the petition. Whether it contained the requisite number of petitioners was a question for the board to decide, and their decision was held to be final and conclusive when attacked collaterally. In *Hord v. Elliott*, 33 Ind. 220, the same principle was recognized. It is said, on page 222: "When the jurisdictional facts do so appear, the record is conclusive against collateral attacks."

In *Weston v. Lumley*, 33 Ind. 486, this court held that although the petition to the county commissioners to enter of record a road was so defective that the court would not hes-

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itate to hold the proceedings under it irregular, still it was also held that it was sufficient to confer jurisdiction upon the board. *Cooper v. Sunderland*, 3 Iowa, 114; *Little v. Sinnett*, 7 Iowa, 324; *Sheldon v. Wright*, 1 Seld. 497; *Jackson v. Robinson*, 4 Wend. 436; *Jackson v. Crawfords*, 12 Wend. 533. Without unnecessarily multiplying authorities, we think the above rule is quite uniform in this State and in some of the others. And whilst there are cases in other states which at first seem to hold otherwise, we think that a thorough examination, comparison, and analysis of all of the decisions will show it to be the true rule. See part 2, vol. 1, Smith's Leading Cases, 1096-7 (marginal, 817-18); *Betts v. Bagley*, 12 Pick. 572; *Wells v. Stevens*, 2 Gray, 115; *Harrington v. The People*, 6 Barb. 607; *Ford v. Walsworth*, 19 Wend. 334; *Hyatt v. Bates*, 35 Barb. 308. In *Harrington v. The People*, *supra*, the record was held defective because it did not show that a written application had been made to the commissioners to lay out the road, without which they had no authority to act. In *Ely v. Cooke*, 28 N. Y. 365, the proceedings were held invalid because the affidavit was not sworn to before the recorder and signed by the recorder before the order was granted.

The same rule prevails as to jurisdiction over the subject-matter and, when necessary, of the person.

When the jurisdiction of inferior courts is once established, then all presumptions and intendments in favor of their proceedings and decisions apply to them as well as to courts of general jurisdiction. The strictness applies only to the question of jurisdiction. *State of Ohio v. Hinchman*, 27 Penn. St. 479; *Fowler v. Jenkins*, 28 Penn. St. 176. In the last case it is said: "The difference is that jurisdiction in one case is presumed, and in the other it must be proved." *Cooper v. Sunderland*, 3 Iowa, 114, 125; *Dempster v. Purnell*, 3 Manning & Granger, 375, 378; *Cason v. Cason*, 31 Miss. 578-92; *Crossley v. O'Brien*, 24 Ind. 325. The court says, on page 331: "But, as to proceedings in the cause after jurisdiction to proceed has been obtained, the-

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same presumption in support of their regularity will be indulged, as in ordinary cases with courts of general jurisdiction." *The Pendleton, etc., Turnpike Co. v. Barnard*, 40 Ind. 146.

The fact that there is no appeal from the decisions affords no ground for an injunction to restrain action under the judgment, or to set it aside. "It does not by any means follow, that because an error * * * may not be corrected by a common law *certiorari*, it is therefore a proper case for equitable interposition." *Hyatt v. Bates, supra*. "The court having power to make the decree, it can be impeached only by fraud in the party who obtains it." *Cooper v. Sunderland, supra*, 133; *United States v. Arredondo*, 6 Pet. 691, 729. There is no allegation of fraud in this case.

The board of county commissioners having acquired jurisdiction to hear and determine the matter of the petition and all questions arising under it, we must presume in favor of the regularity of the proceedings after that, and that whatever was done by them in deciding questions arising in the case, and in acting upon them, was done regularly and upon due proof, and that no order or decision was made, except upon satisfactory proof and proper finding, unless the contrary appears in the record. The proceedings may be irregular and erroneous, and yet valid when attacked collaterally as in this case. *Reeves v. Townsend*, 2 Zab. 396; *Schuylkill Falls' Road*, 2 Binney, 250; *Brown v. Lanman*, 1 Conn. 467. In that case, an objection was made that the court had failed to enter a proper finding of record, and that the order of sale was therefore void. The court, on page 469, says: "Though the proceedings of the court, from the facts stated in the bills, and found by the superior court, were erroneous, and would be set aside on a proper appeal; yet till set aside, the judgment is valid." In *The President, etc., of the Orphans' Court v. Groff*, 14 S. & R. 181, it was held that a decree of the orphans' court, unreversed and unappealed from, cannot be questioned in a collateral suit, except in cases of fraud or

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when the defect plainly appears on the face of the proceedings. And when a party relies upon fraud, it ought to be distinctly and positively alleged, and not inferred merely from circumstances. *Kennedy v. Wachsmuth*, 12 S. & R. 171; *The Pendleton, etc., Turnpike Co. v. Barnard*, 40 Ind. 146. In that case it was held that certain facts, which did not appear in the record of the board of commissioners, would be presumed. It is said, on p. 147-8: "The board granted the prayer of the petitioners, and we think we ought to presume that the board satisfied itself of the existence of these two important facts before granting the request of the petitioners."

See, also, *The Evansville, etc., R. R. Co. v. The City of Evansville*, 15 Ind. 395, and authorities cited; *Rhodes v. Piper*, 40 Ind. 369; *Hornaday v. The State*, 43 Ind. 306.

It is finally insisted that the board ought to be enjoined from letting the contract for the construction of the new county buildings, because the architect did not make any plan, specifications, or estimates for a jail, and that none are on file in the auditor's office; that the plan for the courthouse is so imperfect that it can not be understood, and that the estimated cost of it, as made by the architect, is more than fifteen thousand dollars.

In our opinion, these objections are not sufficient grounds for an injunction. The commissioners were not required to adopt the plans submitted by the architect, nor were they limited to his plans. The act only requires them, on the filing of the petition properly verified, to employ a competent architect to prepare plans, specifications, and estimates suitable for new county buildings. Then follows the provision: "The buildings to be of brick or stone, and the county offices to be fire-proof, or as nearly so as practicable, the cost of the whole not to exceed fifteen thousand dollars, unless requested by the petitioners, and such plans, specifications, and estimates shall be presented to the said board at its next session." There is nothing in the act making a failure of the architect to make plans for the courthouse or jail, or the rejection of his plans, or the omission

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to file or keep them in the auditor's office, fatal to the power of the board to "proceed to have new buildings erected, * * and the county-seat removed." Such plans when submitted were subject to the approval, rejection, or modification by the board. It would be competent for the board to accept a bid, and contract for the erection of buildings upon plans entirely different from those previously adopted or advertised for. The kind of buildings to be erected and the plans and specifications to be finally adopted are matters within the discretion of the board, and over which, in the absence of fraud, no court can exercise any control, so long as its acts are within the scope of its authority.

The question of the right of the county to contract for the erection of county buildings at a cost exceeding fifteen thousand dollars does not arise in this case. We cannot tell in advance that the bids will equal the estimates made by the architect, or that the board will accept of any such bids if made. We will not presume that the board will make a contract in violation of law. If the law limits the cost of the buildings as claimed by the appellees, any contract for their erection at a sum greater than fifteen thousand dollars will be without authority, and the limitation being by public law, the contractors will be affected by notice.

It will be time to apply for an injunction when it is shown that without it there is ground to fear that the board will do an unlawful act or violate its official duty, to the prejudice of the party applying for such injunction. Until that is done, the application for an injunction is premature.

The judgment of the said Clay Circuit Court is reversed, with costs; the cause is remanded, with instructions to said court to sustain the demurrers to both paragraphs of the complaint, and for further proceedings in accordance with this opinion.

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PLEADING.—*Answer.*—False Representation as to Written Instrument.—In an action on a note payable one year after date, and to foreclose a mortgage executed to secure it, an answer that the plaintiff represented at the time the mortgage was made that it was payable in five years, and, relying on the word of the plaintiff, the defendant did not read the mortgage or have it read, and that the original agreement was that the defendant should have five years, was not a good answer.

PRINCIPAL AND AGENT.—*Negligence of Agent.*—Neglect and want of skill of an agent, by which the principal is wronged, will not entitle the principal to relief against a third person not guilty of any wrong in the matter.

PLEADING.—*Action on Note and Mortgage.*—*Answer.*—To an action on a note and mortgage, an answer that the note was given for a stock of goods bought of the plaintiff, and that numerous articles mentioned in the invoice were not in the possession of the plaintiff at the time the invoice was made, and have never been delivered to the defendant, presents no defence in whole or in part.

From the Tippecanoe Circuit Court.

F. W. Coombs and A. Parsons, for appellant.

A. L. Kumler, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellant, on a promissory note executed by her to him, payable one year after date, and to foreclose a mortgage to secure the payment thereof. The defendant pleaded two paragraphs of answer, to each of which a demurrer was sustained by the court. The defendant was then defaulted, and after an inquiry as to the amount of damages, there was final judgment for the plaintiff.

The only questions presented and relied upon by the appellant are the rulings of the court on the demurrs to the paragraphs of the answer.

The first paragraph of the answer is as follows: “The defendant, for answer herein, avers that at the time of the execution of the mortgage sued on, the plaintiff represented that it was payable in five years from the date thereof, and that the defendant, relying upon the word of the plaintiff, did not read or ask to have read the mortgage, nor was it

Bacon v. Markley.

read to her as written. That the mortgage was executed to secure the payment of certain money for the purchase of certain goods by defendant of plaintiff, and that it was a condition of the purchase, well understood and agreed upon at the time, that the defendant should have five years from the date thereof; wherefore," etc.

This is not a good answer. It makes no mention of the note, but speaks of the mortgage only. It does not show fraud. The defendant should have read, or requested to have the papers read to her. The circumstances do not amount to fraud. *Seeright v. Fletcher*, 6 Blackf. 380; *Rogers v. Place*, 29 Ind. 577; *May v. Johnson*, 3 Ind. 449; *Craig v. Hobbs*, 44 Ind. 363.

There is no allegation of mistake, or prayer for the reformation of the instruments.

The second paragraph is as follows: "And the defendant for further answer herein avers, that the consideration of the execution of the note and mortgage sued on was the purchase of certain goods and fixtures then in the city of Lafayette, in this county and State; that the defendant at that time entrusted the care and management of invoicing the said goods and fixtures to one John H. Bacon, for the purpose of ascertaining; a copy of which invoice is herewith filed, marked 'A,' that owing to the negligence of the said John H. Bacon, and owing to his want of skill, which at that time was unknown to this defendant, the goods and fixtures were placed at a much higher estimate than their true value; all of which the said Markley well knew at the time; and the defendant avers that numerous articles mentioned in said invoice were not in the possession of said Markley at the time the said invoice was made, and have never been delivered to this defendant; wherefore the defendant says that as to a large amount, to wit, fifteen hundred dollars, there was no consideration for the execution of said mortgage, and prays judgment accordingly."

How it can be supposed that the negligence and want of skill of the defendant's own agent, appointed by her to

Adams v. The State.

invoice and value the goods for which the note was given, can affect her liability on the note, we do not perceive. The acts of a party done by an agent are regarded as though they had been done by him in person. Counsel for appellant say : "The paragraph is substantially an averment that the appellee defrauded the appellant by misrepresentations." We do not think the paragraph contains any charge of fraud. As to the other branch of this paragraph, which alleges that numerous articles mentioned in the invoice were not in the possession of said Markley at the time the invoice was made, and have never been delivered to the defendant, we think it presents no defence to the action, in whole or in part. As to the articles which were not in the possession of the plaintiff at the time of the sale, there was no implied warranty of title, and no express warranty is alleged, nor is it shown that the plaintiff undertook or promised to deliver them, or that the defendant was not to accept and take them where they were at the time of the sale. The paragraph on this point is too uncertain. It says, "numerous articles mentioned in the inventory," etc. It should have stated what articles.

The judgment is affirmed, with costs and two per cent. damages.

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ADAMS v. THE STATE.

From the Madison Circuit Court.

J. A. Harrison, J. W. Sansberry, and C. D. Thompson, for appellant.

J. C. Denny, Attorney General, for the State.

PER CURIAM.—This was an indictment against the appellant for an assault and battery with intent to murder. On

Newman v. Hammond.

a trial by jury, the defendant was found guilty, a motion made by him for a new trial was overruled, and sentence was pronounced against him.

The third error assigned is, that the court erred in overruling the defendant's motion for a new trial. This error is confessed by the Attorney General, and counsel for appellant do not ask a decision of the questions presented by the other assignments.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

NEWMAN v. HAMMOND.

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144	288
46	119
150	588
150	588

RECEIVER.—*Appointment of.*—A judge has no power to appoint a receiver during vacation, nor has a clerk any power to approve a receiver's bond in vacation.

COURT.—*Power of in Term Time and Vacation.*—Where a law authorizes or contemplates the doing of an act by a court, it is and must be understood that the court in term time may or must do it, and the judge in vacation cannot, unless the power is expressly conferred upon him by law.

From the Ripley Circuit Court.

E. P. Ferris, for appellant.

J. K. Thompson and S. S. Harding, for appellee.

PETTIT, J.—This suit was brought by Phillip D. Hammond, receiver of the Home Insurance Company of Lafayette, Ind., against the appellant, John W. Newman, on a note given for a policy of insurance, and made payable to the company.

There was a demurrer to the complaint for these causes:

“1. The complaint does not state facts sufficient to constitute a cause of action.

“2. Because there is a defect of parties plaintiffs.”

The demurrer was overruled, exception taken, and this

Kercheval *v.* The State.

ruling is assigned for error. We hold that this ruling was error, for which the judgment must be reversed. The complaint shows that the receiver was appointed by the judge in vacation, and not by the court. The receiver's bond was taken and approved by the clerk in vacation, and not by the court. Both of these acts are required by our statute to be done by the court, but not by the judge or clerk in vacation. 2 G. & H. 151, 153, secs. 199 and 201. Where a law authorizes or contemplates the doing of an act by a court, it is and must be understood that the court in term time may or must do it, and the judge in vacation cannot, unless the power is expressly conferred upon him by law. *Ferger v. Wesler*, 35 Ind. 53.

There is no law in this State authorizing the judge to appoint a receiver, or the clerk to take and approve his bond in vacation, hence the appointment was void, and the receiver had no legal right to maintain the suit. The court ought to have sustained the demurrer to the complaint, which would have ended the case; hence there are no other questions in the record.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to sustain the demurrer to the complaint.

KERCHEVAL *v.* THE STATE.

CRIMINAL LAW.—Assault and Battery.—Evidence.—On the trial of an information for assault and battery, evidence is admissible, to show the animus of the defendant and give character to the alleged offence, that a felony had been committed in the neighborhood within a few days before the alleged assault and battery, that there were circumstances of suspicion that the prosecuting witness had committed the felony, that the defendant and others, as members of an association authorized by law for the detection and apprehension of fel-

Kercheval *v.* The State.

ons, arrested said witness upon suspicion of having committed the felony, and that such arrest was the assault and battery complained of.

From the Hamilton Common Pleas.

D. Moss and F. M. Trissal, for appellant.

J. C. Denny, Attorney General, for the State.

DOWNEY, J.—This was an information against the appellant for an assault and battery upon one Levi Cutts. Other persons were included in the information as defendants, but this case concerns the appellant alone.

No question is made as to the sufficiency of the information. Upon a trial by jury, the defendant was found guilty. He moved the court for a new trial, which was refused, and final judgment rendered against him. The error assigned is the overruling of the motion for a new trial.

On the trial of the cause, the defendant offered to prove that a felony had been committed in the neighborhood within a few days before the time when the alleged assault and battery was committed; that the prosecuting witness was suspected of having been concerned in its commission; that the defendant and others acting with him were members of an association organized under the act of March 9th, 1852, 1 G. & H. 372, to authorize the formation of companies for the detection and apprehension of horse thieves and other felons, and defining their powers, having entered into articles of association intended to be in conformity to the statute; that the alleged assault and battery consisted of the arrest of the prosecuting witness by the defendant and the others upon suspicion of his guilt of such felony, etc.

The defendant also offered in evidence the record of the articles of association of the company. The court excluded the evidence offered of the commission of the felony, the circumstances of suspicion against the prosecuting witness, the articles of association of the company, and the fact that the defendant was a member thereof, and acting as such when he assisted in making the arrest; and

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instructed the jury that such facts were inadmissible either in justification of the acts of the defendant or in mitigation of punishment. The statute relating to such companies provides, that "every one of the members of such company, when engaged in arresting offenders against the criminal laws of this State, shall be entitled to all the rights and privileges of constables." Sec. 10.

We do not deem it necessary or proper to decide whether the evidence offered would have shown that the defendant was justifiable in what he did or not, but we think it clear that the offered evidence should have been admitted. If it was not a full justification, it was undoubtedly admissible to show the animus of the defendant, and to give character to the alleged assault and battery. 1 Russell Crimes, 595; *Wasson v. Canfield*, 6 Blackf. 406.

The judgment is reversed, and the cause remanded, for a new trial.

HOLTON *v.* BROWN.

ELECTION.—*Contest of Election.—Affidavit.*—In a proceeding to contest the election of a county officer, the grounds of contest must be verified by the affidavit of the contestor. If the affidavit is made by any person other than the contestor, the proceedings should be dismissed.

From the Lake Circuit Court.

M. Wood, T. F. Wood, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellant.

E. C. Field and J. Barnard, for appellee.

WORDEN, C. J.—Holton and Brown respectively were candidates, at the election of 1870, for the office of treasurer of Lake county. Brown was declared elected. Holton insti-

Holton *v.* Brown.

tuted proceedings before the Board of Commissioners of Lake County, to contest Brown's election, filing a statement of the grounds of contest verified by the affidavit of one George Sanford, but not by his own.

The proceedings were dismissed by the board of commissioners. An appeal was taken to the circuit court, where, on the written motion of Brown, specifying as one of the grounds thereof that the statement was not verified by the affidavit of the contestor, the cause was dismissed.

The contestor then moved for leave to file an amended statement of the grounds of contest, verified also by the affidavit of Sanford, but not by his own, but this motion was overruled.

There was no error in either of these rulings.

The statute provides, that "the person contesting such election shall be known as the contestor; and the person whose election is contested, as the contestee."

The statement specifying the grounds of contest is to be verified by the affidavit of the contestor. 1 G. & H. 316, secs. 1, 2, and 16.

This case was commenced before the board of commissioners, and was there carried on, as well as in the circuit court, in the name of James S. Holton as contestor against Brown as contestee.

No statement of the grounds of contest verified by the affidavit of Holton was filed; and this was good ground for the dismissal of the proceedings.

If after the dismissal the case could have been reinstated upon the filing of a statement duly verified by the contestor, still there was no offer to file such statement. It appears that Sanford was an elector entitled to vote at the election held, and he was entitled to contest the election, but he did not do so. Holton, as we have seen, was the party to the record as contestor. If the amended statement of the grounds of contest had been allowed to be filed, it could only have authorized proceedings in the name of Sanford as contestor, and this would have been equivalent to the insti-

Watts *et al.* v. Watson.

tution of new proceedings in the circuit court, which could not be done.

The judgment below is affirmed, with costs.

OSBORN, J., was absent when this cause was considered.

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WATTS ET AL. v. WATSON.

From the Vigo Circuit Court.

Key, Blake & Ray, for appellants.

J. P. Baird, C. Crift, and *W. Mack*, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellants, to set aside a conveyance alleged to have been made by said Henry Watts to the other defendants, for the purpose of defrauding the appellee and preventing him from making the damages to which he was entitled on account of a cause of action which he had against said Henry for slander. In the circuit court, there was judgment for the plaintiff.

Several errors are assigned in this court, some of which, not presenting any question, need not be particularly noticed. Those which appear to us to be well assigned are:

1. The overruling of the demurrer to the complaint.
2. The sustaining of the demurrer to the third paragraph of the answer.
3. The overruling of the demurrer to the reply.
4. Refusing to grant a *venire de novo* on the application of the defendants; and,
5. Refusing to grant a new trial.

The brief on the part of the appellants is simply a repetition of the assignments of error, without argument or authority. We have examined the case with some care, and are of the opinion that the judgment ought to be affirmed.

The judgment is affirmed, with costs.

Gimbel et al. v. Hufford et al.

GIMBEL ET AL. v. HUFFORD ET AL.

EVIDENCE.—Written Instrument.—Copy and Original.—Where an original bill of lading is in the possession and under the control of the plaintiff, it is error to admit in evidence, on behalf of the plaintiff, a copy, or if admitted and it afterward appears that the original is in the hands of the plaintiff, the copy should be withdrawn.

SAME.—Deposition.—It is proper for a witness, whose deposition is taken, to identify a written instrument, and attach a copy of it to the deposition, and such part of the deposition should not be suppressed, for the absence of the original may be accounted for, and the copy be rendered admissible.

INSTRUCTION.—Evidence of Trivial Statements.—Where there is no evidence of declarations lightly made in a trivial way, it is error to instruct a jury that declarations lightly made in a trivial way, by a party, without his attention being called to the subject-matter, form a very weak class of testimony.

From the Knox Common Pleas.

T. R. Cobb and N. F. Malott, for appellants.

J. C. Denny, G. G. Reily, and W. C. Johnson, for appellees.

BUSKIRK, J.—This was an action by the appellees against appellants, to recover the possession of six barrels of whiskey.

There was issue, trial by jury, verdict for appellees, and, over a motion for a new trial, judgment on the verdict.

The error assigned is for overruling the motion for a new trial.

The whiskey in controversy was made and originally owned by the appellees, who carried on the distilling business at Uniontown, Kentucky, situate on the Ohio river, some sixty miles below Evansville, Indiana. On the 20th day of January, 1870, the whiskey was shipped from Uniontown through Richeson & Hatfield, forwarding merchants, to Humphrey, Lewis & Co., at Evansville, to be forwarded by rail to Vincennes. The barrels were marked "M. T." but no bill of lading accompanied the whiskey, or any writing, indicating who was the consignee, other than said initials. Humphrey, Lewis & Co. received the whiskey January 21st, 1870, and wrote the same day to Richeson & Hatfield to learn the name of the consignee. The latter answered the same day, that the whiskey was shipped by them "per

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account Capt. Jeffries or Hufford & Lytle ; M. Thomas, Vincennes, Ind., by rail." On January 22d, 1870, the whiskey reached the railroad depot of Vincennes, with nothing accompanying, excepting said initials, to indicate the consignee. The depot agent, Agnon, wrote the same day to Humphrey, Lewis & Co., to learn the name of the consignee, and in reply was directed to deliver it to M. Thomas as owner. On the 25th of January, 1870, a stranger called on appellants at their store in Vincennes. He claimed to be "M. Thomas" and agent for the appellees, and proposed to sell them six barrels of whiskey then lying in the railroad depot. He exhibited a sample of the whiskey and bill of lading for same, issued to Richeson & Hatfield, as consignees. Appellants were wholesale liquor dealers at the time, and agreed to take the whiskey at one dollar per gallon, if it agreed with the sample. The stranger then had a drayman to bring the whiskey from depot to appellants' store and there consummated the sale, receiving one dollar per gallon, and gave appellants a bill of sale received by him as agent for appellees. There was no person living or doing business in Vincennes on or before January 25th, 1870, by the name of M. Thomas. The person claiming to be M. Thomas disappeared from Vincennes, after making sale of said whiskey, and has not been heard of since. It is very obvious that the appellants at the time of the sale believed that the person who represented himself to be M. Thomas was the person he represented himself to be, and had no knowledge then of Capt. Jeffries, or of his having any thing to do with the whiskey. After the sale and before the bringing of the suit, the appellees demanded of the appellants the whiskey, who refused to deliver the same.

On the trial, the appellees claimed and submitted evidence tending to prove that one Capt. Jeffries, who had been stopping a few weeks at Uniontown, showed them a letter purporting to be from M. Thomas, a wholesale liquor dealer at Vincennes, Indiana, inquiring where he could buy six bar-

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rels of copper distilled whiskey; that Jeffries represented Thomas to be responsible; that appellees, wanting to start a trade in Vincennes, shipped the whiskey in suit to Vincennes, marked "M. T.;" that Jeffries followed the whiskey to Vincennes, and claiming to be M. Thomas, sold the whiskey to appellants; and that the sale was without appellees' authority and made under circumstances sufficient to put appellants upon inquiry as to Jeffries' right to sell.

The appellants, on the other hand, claimed on the trial that the proof would fail to show that it was Jeffries who sold the whiskey to them; that the proof would fail to show that the person who sold them the whiskey was not M. Thomas; that the proof would fail to show any bad faith or want of caution or prudence on their part; that the appellees had previously sold and delivered the whiskey to Jeffries, and that they had purchased in good faith and for value; that if they failed to prove an actual sale to Jeffries, the appellees were estopped from asserting any claim to the whiskey, because they had intrusted the party selling to them, whether Jeffries, Thomas, or some other person, with the bill of lading for the whiskey, and upon the faith of it and the party's possession of the whiskey, the appellants had bought the whiskey in good faith and without notice of any fraud on the part of the person selling; that as the appellees had enabled the person selling to them to practise a fraud and deception upon innocent persons, they should suffer the loss, rather than the appellants, who had acted in good faith and with reasonable caution and prudence.

Having thus given the material facts in this unusual and peculiar case, as shown by the record, we proceed to the examination of the errors complained of.

On the trial of the cause, the appellees offered to read in evidence a copy of a bill of lading and the deposition of Hatfield in connection therewith. The appellants objected, because no legal excuse had been shown for failing to produce the original. The depositions of the appellees had already been read, to the effect that they had shipped the

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whiskey to M. Thomas. The court overruled the objection, and the matter objected to was read over appellants' exception. The appellee Lytle afterward testified on the trial that he had then in his possession at Uniontown, Kentucky, the original bill of lading, shown by copy in Hatfield's deposition above mentioned. The appellants thereupon moved the court to exclude from the consideration of the jury such copy. The court overruled the motion, and the appellants again excepted. Both these rulings were assigned as reasons for a new trial.

The evidence was material. It was important to the appellees as tending to prove that the shipment was in fact made by them to M. Thomas, and that Jeffries had no right to interfere with the whiskey. The evidence, in the light of other evidence, was material and must have had influence with the jury. The copy of the bill of lading admitted over objection of appellants shows a shipment by the steamer "Quickstep," and has the words in it "To be forwarded to M. Thomas, Vincennes, Ind., by rail, per account Hufford & Lytle." The copy of bill of lading furnished by Richeson & Hatfield to Humphrey, Lewis & Co., the next day after the shipment, shows a shipment by the steamer Fayette, omits the name of M. Thomas and Hufford & Lytle, and simply has the words, "To be forwarded by rail." Kerney swore the whiskey was received from the steamer Fayette. Hatfield in his first deposition says that Jeffries had nothing to do with the shipment of the whiskey. Richeson & Hatfield's letter, written January 21st, says the whiskey was shipped per account of Jeffries or Hufford & Lytle. Hatfield's second deposition shows that Jeffries was present and directing the shipment.

Counsel for appellees insist that the copy was properly admitted, and refer us to the case of *Thom v. Wilson's Ex'r*, 27 Ind. 370.

In that case the court say: "It was also objected that the contract itself was not produced, but only a copy. The appellees requested the witness to file the original, but as

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the paper was the property of the witness, and he was beyond the jurisdiction of the court, the copy furnished and made a part of the deposition was sufficient."

It appears from the record in the above case that the witness, whose deposition was taken, was not a party to the action ; that he resided beyond the jurisdiction of the court ; that he was the owner and in possession of the original paper, and upon request refused to attach the same to his deposition.

In the present case, it is not shown by the deposition of Hatfield, that he had in his possession the original bill of lading, or that he was asked to attach the original to his deposition. He was asked to attach a copy, which he says he did.

The ruling in the above case was based upon the ground that the witness was the owner of the original paper and refused to make it a part of his deposition, and that being beyond the jurisdiction of the court, there was no way of compelling him to produce in court the original paper.

In the present case, it was shown upon the trial that the original bill of lading was in the possession and under the control of the plaintiffs, who had come into this State, and were seeking to assert in our courts their rights, which were mainly based upon the terms and legal effect of the bill of lading. The plaintiffs, being suitors in the courts of this State, were bound by the same rules as though they were actual residents of this State. They, in their character of suitors, were entitled to the same rights and remedies as citizens of the State. It was proper for Mr. Hatfield to identify and attach to his deposition a copy of the original bill of lading, and it would have been improper for the court to have suppressed that portion of his deposition, because the plaintiffs might, upon the trial, have accounted for the loss or absence of the original, and thus rendered the copy admissible in evidence. *The B. & O. R. R. Co. v. McWhinney*, 36 Ind. 436. The plaintiffs, however, offered to read in evi-

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dence such copy, without in any manner accounting for the original, and the defendants objected upon the ground that no legal excuse was shown for not producing the original.

It is very plain and obvious that the court erred in admitting in evidence such copy; and it is equally as plain and obvious that when it appeared upon the trial that such original bill of lading was in the possession, and under the control of the plaintiffs, the court should have withdrawn from the jury a copy of such bill.

Counsel for appellants complain of the giving and the refusal to give instructions. The court, of its own motion, gave eight instructions, to all of which exceptions were taken. The appellants asked the court to give eleven instructions, but the court refused to give any of them, to which proper exceptions were taken.

We will, in the first place, consider the action of the court in refusing to instruct as asked.

The first and second instructions asked were covered by the first instruction given by the court.

The third instruction asked contained a correct exposition of the law, and was not embraced in any which were given, and should have been given.

The fourth, fifth, sixth, seventh, eighth, and ninth instructions asked were substantially embraced in the second, third, fourth, fifth, and sixth instructions given.

The tenth instruction asked was in substance the same as the third instruction asked and refused, and there was no error in refusing it the second time.

The eleventh should have been given.

The seventh instruction given by the court is especially complained of by counsel for appellants. It is as follows: "Declarations lightly made in a trivial way by a party, without his attention being called to the subject-matter, form a very weak class of testimony. Declarations made by third parties, while not engaged in some of the business transactions out of which the suit grows, cannot be regarded as evidence in the case."

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Counsel admit that the foregoing instruction contains a correct exposition of the law as abstract propositions, but contend that they are not applicable to the evidence in the cause. The only declarations of a party, to which the first branch of the above instruction could be applied, are those of Lytle as testified to by Kerney, who was a member of the firm of Humphrey, Lewis & Co., forwarding merchants of Evansville. He testified that Lytle, one of the plaintiffs, called on him about the 24th of January, 1870, and inquired of him about the whereabouts of the six barrels of whiskey. Kerney informed him that the whiskey had been shipped to Vincennes, with instructions to deliver it to M. Thomas, pursuant to the letter of Richeson & Hatfield. Lytle then stated that "Jeffries had bought the six barrels of whiskey from the plaintiffs, and given his note or draft for it; that Jeffries had got the whiskey and gone away with it; that he, Lytle, had concluded that Jeffries would not pay for the whiskey, and he wanted to get possession of it before Jeffries disposed of it."

The above declarations do not appear to have been "lightly made in a trivial way." They seem to have been deliberately made, while his attention was especially given to the recovery of the whiskey. After a careful examination of the evidence in the record, we have failed to find any to which the above instruction could be applicable. It was therefore calculated to mislead the jury.

Other questions are discussed by counsel, but as they are not likely to arise upon another trial, we shall not further notice them.

The judgment is reversed, with costs; and the cause is remanded, for a new trial in accordance with this opinion.

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JUROR.—*Competency.*—*Waiver.*—On the trial of a criminal cause, the defendant, as well as the State, by failing to interrogate the jury as to their being householders or freeholders, or to take other steps to ascertain their competency in that respect before accepting them and before they are sworn to try the cause, waive objection on the ground of the want of such qualifications, and the defendant as well as the State will be bound by the verdict of such jury, though one or more of them may not be householders or freeholders.

SAME.—*Criminal Law.*—*Jeopardy.*—By the swearing of such jury to try the cause after such waiver, the defendant was put in jeopardy, and was entitled to have a verdict at their hands; and the discharge of one of such jurors by the court on finding that he was not a freeholder or householder, without the consent of the defendant, would have been equivalent to the acquittal of the defendant, and such defendant could not again have been put on trial for the same offence. But the defendant being in court in person and by counsel, at the time such juror was discharged, and neither excepting nor objecting, such discharge must be held to have been with the consent of the defendant, and subsequently putting the defendant on trial was not error.

From the Hancock Circuit Court.

H. J. Dunbar, J. A. New, and D. S. Gooding, for appellant..
J. C. Denny, Attorney General, for the State.

WORDEN, C. J.—The appellant was indicted, together with her husband Harrison Kingen, for the murder of Samuel Derry by stabbing him with knives. The accused parties were tried separately. The appellant, on trial by a jury, was convicted of manslaughter, and sentenced to imprisonment in the county jail for the term of two years.

It is shown by a bill of exceptions that a jury had been selected and agreed upon by the parties, and had been sworn to try the cause, and had been permitted to retire under the charge of a sworn bailiff, no evidence having been introduced, and the case not having been stated to them. On the meeting of the court in the afternoon, it was discovered for the first time that one of the jurors was not a householder or a freeholder of the county. The jurors, before they were sworn, had been interrogated as to having formed or expressed any opinion as to the guilt or innocence of the

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accused, but not as to their qualification in any other respect. The defendant, as the bill of exceptions shows, "refused to waive any objection to the juror," and the court thereupon directed the juror to retire from the box in consequence of his incompetency, and directed the sheriff to supply his place with another person, which was done, and the new juror was interrogated as to his qualifications, and the jury as newly constituted was duly sworn. On the discharge of the incompetent juror, the defendant moved to be discharged from the prosecution, on the ground that she had been in jeopardy, and that the discharge of the juror was equivalent to an acquittal. The motion was overruled, and exception taken. On the filling up of the panel of jurors, the defendant again moved to be discharged and objected to being again put upon trial for the same reason, but the court ordered the trial to proceed. Exception.

In *Croy v. The State*, 32 Ind. 384, it was held, upon a full consideration of the question, that where a defendant failed to interrogate the jurors at the proper time in respect to their being householders of the county, it was too late to make any question afterward in that respect; and that a new trial could not be granted on the ground that one of the jurors was not a householder. We concur in the conclusion thus arrived at.

The defendant, as well as the State, by failing to interrogate the jury which was first sworn, as to their being householders, or taking other steps to ascertain their competency in that respect, waived any objection on that ground. The defendant, as well as the State, would have been bound by the verdict of that jury as much as if each juror had been in all respects competent. The defendant had already waived all objection to the juror on the ground mentioned, and her refusal to waive the objection after the incompetency of the juror was discovered cannot change the legal aspect of the case. We do not understand the record as showing that the defendant made any objection to the juror, but simply that she refused to waive any objection. We have seen that a

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verdict rendered by the jury first sworn would have been valid and binding. The defendant, doubtless, by the swearing of that jury was put in jeopardy, and she was entitled to have a verdict at their hands. If the court discharged them without sufficient legal reason and without the consent of the defendant, the conclusion seems to be irresistible that such discharge was equivalent to an acquittal of the defendant, and she could not rightfully be put upon trial again for the same offence. The cause for which the juror was discharged was not a sufficient legal cause. The parties had waived all objection to his competency in respect to his not being a householder, and that made him as competent as if he had been such. But the question arises, was he discharged without the consent of the accused? The bill of exceptions does not show that she either consented or objected. She was present in court in person and by counsel, and suffered the juror to be discharged without exception or objection. Under the numerous decisions of this court, both in civil and criminal cases, based upon the statutes regulating the practice, we think it well established that whatever is done by the court without objection of the parties, they having an opportunity to object, must be deemed to have been done with their consent. The defendant clearly waived any objection to the discharge of the juror by failing to object or except thereto, and by her silence in this respect she must be deemed to have consented. 1 Bish. Crim. Law, 5 ed., sec. 1045. The juror being thus discharged with her consent, the subsequent proceedings in putting her upon trial were not erroneous.

There was a motion for a new trial, because, among other things, of improper charges given. For a statement of the general facts in the case, see the case of *Kingen v. The State*, 45 Ind. 518. The court gave in this case the same charge as was given in that, and for the reasons therein stated the judgment must be reversed.

The judgment is reversed, and the cause remanded, for a new trial.

Smith, Ex'r, v. McCormick et al.

SMITH, EXECUTOR, v. McCORMICK ET AL.

WILL.—*Election to take Real Estate or Money.*—A. made his will, giving to his two daughters eight thousand dollars each, which they or either of them might take in real estate not disposed of by will, at its fair value, or they might decline to take the same or any part thereof in real estate; if not taken in real estate, to be paid in money; and if necessary, in order to pay the same, the executor to sell real estate and pay the same; the said daughters to enjoy the use of the money bequeathed to each “during their natural lives and at their death to revert and descend to the heirs of their body.”

Held, that the devisees were required to make an election whether they would take real estate or money, and the legacies were not payable in money until they declined to take real estate.

Held, also, that the title to the undevised real estate vested upon the death of the testator in his heirs at law, and the executor had no power to convey to the devisees the real estate by them or either of them selected.

Held, also, that a commissioner should be appointed to convey the lands selected, after the same had been appraised by suitable and competent persons appointed for the purpose.

Held, also, that the devisees would hold and possess the lands selected in fee simple, and the money paid them would be theirs absolutely.

From the Switzerland Circuit Court.

W. M. Smith and L. O. Schroeder, for appellant.

W. D. Ward and J. B. McCrellis, for appellees.

BUSKIRK, J.—On the 6th day of March, 1872, George Tardy died, leaving the following will:

“I, George Tardy, of Vevay, Switzerland county, Indiana, being of sound and disposing mind and memory, knowing the certainty of death and the uncertainty of life, do make and publish this last will and testament, revoking all former wills and testaments by me at any time heretofore made. It is my wish and desire that after my death my body be decently buried. As to what worldly goods or property it has pleased God to enable me to accumulate, I dispose of the same in the manner and form following:

“Item 1. I desire that so soon after my death as convenient, my executor proceed to collect what debts may be owing to me, without unreasonable delay, and as soon as the same shall become due; that out of the first moneys that may

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come to his hands belonging to my estate, he pay off my just debts and the expenses of my last illness and burial.

" Item 2. I direct that my farm, lying on Indian creek, and running toward Vevay, supposed to contain about three hundred and forty acres, be divided by running a line from the northern boundary, and running south to the southern boundary, so that the eastern division thereof shall contain forty acres of land less than the western division ; that is to say, the eastern division to contain one hundred and fifty acres, and the western division one hundred and ninety acres.

" Item 3. I give and bequeath the eastern division of my said Indian creek farm to my son Henry Tardy, for and during his natural life, and at his death that the same shall revert and descend to the heirs of his body, that is, to his children, whom I desire and direct shall come into and take possession of the same immediately after his death ; and I further desire and direct that the wife of my said son Henry Tardy shall in nowise enjoy or occupy said eastern division of my said farm after the death of the said Henry Tardy ; reserving, however, the use of the barn and hay-press jointly between my sons Henry Tardy and Eugene Tardy, or their descendants, so long as the said Eugene may desire to use said barn and press; and should the said Eugene build a barn and press on the land adjoining said Henry, then, and in that case, Henry to pay Eugene a reasonable amount for his interest in the barn and press on the land bequeathed to Henry ; and should either of them injure or break any part of said hay-press, the one so injuring or breaking shall have the same repaired at his own costs and charges.

" Item 4. I give and bequeath to my son Eugene Tardy the western division of my said Indian creek farm, for and during his natural life, and at his death that the same shall revert and descend to the heirs of his body, that is, to his children ; also, the joint use of the barn and hay-press on the eastern division of my said Indian creek farm with his brother Henry, on the terms and conditions mentioned in item 3 ; and after the death of my said son Eugene, I desire

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and direct that his wife, Alice, so long as she remain his widow, may enjoy and occupy the said western division of my said farm jointly with the children of my said son Eugene.

"Item 5. I give and bequeath to the children of my daughter Adelaide Oakley the sum of one thousand two hundred dollars, which said sum I direct my executor to place at interest well secured by mortgage on real estate, until the youngest of said children shall arrive at the age of twenty-one years, and that out of the interest received from said sum of money there be paid annually to my said daughter Adelaide fifty dollars, and that the balance of the yearly interest be placed at interest until the youngest of said children shall have attained the age of twenty-one years, when the said principal and accumulated interest shall be equally divided between the children of my said daughter Adelaide Oakley, share and share alike.

"Item 6. I desire that my executor place at interest the sum of one thousand dollars, well secured by mortgage on real estate, and that he pay the interest on the said one thousand dollars to my son George Tardy during his natural life, and that on the death of my said son George Tardy, my executor divide and pay over to my sons Henry and Eugene Tardy, and to my daughters Adelaide Oakley, Josephine Todd, and Julia Thiebaud, the said one thousand dollars, in equal amounts to each, share and share alike.

"Item 7. I give and bequeath to my daughters Josephine Todd, wife of Henry Todd, and Julia Thiebaud" (now McCormick), "widow of Edward Thiebaud, deceased" (now wife of David McCormick), "the sum of eight thousand dollars each, which they, or either of them, may take in any real estate I may die possessed of not disposed of by this last will and testament, at a fair valuation of the same; or should they, or either of them, decline taking the same, or any part thereof, in real estate, I direct that my executor pay the same to them, or either of them, in cash; and if it shall become necessary to sell real estate to make out the said

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sum to my said daughters Josephine and Julia, I direct that my said executor proceed to sell what real estate I may die possessed of, either at public or private sale, on the best terms as in his judgment and discretion will best conduce to the interest of my estate, and out of the proceeds of such sale he pay the said Josephine and Julia a sum sufficient to make up the said eight thousand dollars to each; and it is my desire and wish, and this bequest is made to my said daughters Josephine and Julia on the express condition and understanding, that they are to enjoy and use the eight thousand dollars bequeathed to each of them during their natural lives, and at their death to revert and descend to the heirs of their body.

"Item 8. I give and bequeath to my daughter Julia Thiebaud" (now McCormick) "all my household and kitchen furniture, except my bed and bedding and wearing apparel.

"Item 9. After paying all the legacies named herein, and the paying of all the expenses of my last illness and burial, if there be any amount remaining, I direct that the same be by my executor equally divided, share and share alike, between my sons Henry, Eugene, and George, and my daughters Adelaide Oakley, Josephine Todd, and Julia Thiebaud" (now McCormick); "the amount that would be for George Tardy to be placed at interest the same as the one thousand dollars mentioned in item 6, and to be disposed of in the same manner; and the amount that would be coming to my daughter Adelaide to be placed at interest and be disposed of for the benefit of her and her children in the manner the one thousand two hundred dollars mentioned in item 5 is to be disposed of.

"Item 10. I hereby constitute and appoint William M. Smith executor of this my last will and testament.

"In witness whereof, I have hereunto set my hand and seal this the 8th day of December, 1869.

"GEORGE TARDY." (seal.)

On the 13th day of January, 1874, appellees brought this action against the appellant, alleging that they are the

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devisees named in item 7 of the above will, in which they ask the court to "order and direct the said executor to convey to them such real estate as they, or either of them, may select, by deed in fee simple, and pay over to them such moneys as they, or either of them, may choose to take, to be used and enjoyed by them as they may see proper and right in the premises." To this petition there was filed a general demurrer that it did not state facts sufficient, etc. This demurrer was overruled, and judgment rendered on the demurrer. Was the action of the court right?

The allegations of the complaint, in reference to the election of the appellees, and the refusal of the appellant, are as follows :

"They further allege, that by the terms of the said will they are entitled to a fee simple in any real estate they may choose to take, and the unrestrained use and control of all moneys they or either of them may choose to take as part of the legacy aforesaid; and that the said executor giving to the said will a construction not as they believe warranted by the law, has failed and refused, and still fails and refuses to pay over to them, the moneys now in his hands, and to which they are entitled, or convey to them the portions of said real estate already selected by them, by an absolute and indefeasible title in fee simple, though often requested so to do."

The only error assigned is based upon the overruling of the demurrer to the complaint.

Counsel for appellant assume the following positions :

"There is manifest error in the record, for two reasons, to wit :

"1. The petition does not allege that the plaintiffs below, or either of them, had elected to take either real property or personality, or part realty and part personality. This will gives appellees an election as to how they will take their bequests, and such election must not only be made, but the executor must be notified properly of such election, and must have refused compliance with the same, before an action

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of this kind will lie against him. These facts must be pleaded.
2 G. & H. 72, notes *e, f, g*, and cases cited.

"2. Under this will, appellees take only a life estate. There are bequests of eight thousand dollars to each of the two daughters, Josephine and Julia, to be paid in money or real estate, or part money and part real estate, at the option of the taker. Without the election on the part of the taker to have real estate, then it is money. This election is *déhors* the will, and can have no influence in fixing the nature of the gift."

By the seventh clause of the foregoing will, the testator devised to each of his daughters Josephine and Julia eight thousand dollars, with the privilege on the part of each to take the whole in real estate or money, or a part in real estate and a part in money. The devisees are required to make an election. The legacies are not payable in money until the devisees decline to take real estate. No provision is made in the will for the selection, appraisalment, and conveyance of such real estate. The title to the undevised real estate vested, upon the death of the testator, in his heirs at law. No title is vested in the executor, nor is any power or authority conferred on him to execute a conveyance to the devisees for the real estate by them or either of them selected. The executor is authorized to sell real estate, if it shall become necessary to do so, to procure money to pay the legacies provided for in the seventh clause of the will; but this would not authorize him to convey real estate selected in pursuance of such clause of said will. The devisees have the right to select from any undevised lands of which the testator died seized and possessed. In the absence of any provision for the appraisalment and conveyance of the real estate so selected, we think the better mode would be for the devisees, when they have made a selection of land, to file their petition in the court below, setting forth specifically the lands selected, and praying the court to appoint suitable and competent persons to appraise the lands so selected, and when the appraisalment so made shall be

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confirmed by the court, it should appoint a commissioner to convey the lands so selected and appraised. When this shall be done, the devisees will be entitled to demand and receive from the executor such sum of money as will make, with the real estate selected, the sum of eight thousand dollars to each of them. It is expressly provided by the said clause of said will, that the money shall be paid to the devisees named. They are entitled to the money, and not to the interest merely thereof. Nor has the executor the right to require of such devisees, or either of them, a bond conditioned that they will pay such money to the heirs of their bodies.

As the executor is required to pay the legacy to the persons named, he will be discharged from liability when he does so, and is not interested in what shall become of it upon the death of the legatees.

In our opinion, the devisees will hold and possess the lands selected, in fee simple and the money paid to them will belong absolutely to them.

This view is so well settled by the adjudged cases in this court, that we do not feel called upon to do more than cite such cases. See *Sorden v. Gatewood*, 1 Ind. 107; *Doe v. Jackman*, 5 Ind. 283; *Siceloff v. Redman's Adm'r*, 26 Ind. 251; *Prior v. Quackenbush*, 29 Ind. 475; *Andrews v. Spurlin*, 35 Ind. 262.

It results, from what we have said, that the complaint was bad, and the final judgment erroneous. The whole case proceeded on the theory that it was the duty of the executor to convey the lands selected.

The judgment is reversed, with costs; and the cause is remanded, for further proceedings in accordance with this opinion.

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46	146
194	409
46	142
141	490
46	142
153	497
46	142
155	66

THE INDIANAPOLIS FURNACE AND MINING CO. v. HERKIMER.

CORPORATION.—*Pleading.*—In an action by a corporation, an answer of general denial does not put in issue the existence of the corporation.

SAME.—*Organization.*—The signing of articles of association by parties proposing to form a manufacturing corporation does not create such corporation; the subscribers must also make, sign, and acknowledge the certificate of incorporation prescribed in section 1 of the act for the incorporation of manufacturing corporations, and must file the same in the recorder's office of the proper county and a duplicate thereof in the office of the secretary of state. Until these steps have been taken, the corporation has no legal existence.

SAME.—*Stock Subscription.*—*Estoppel.*—Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation.

SAME.—*Evidence.*—When *nul til corporation* is properly pleaded, the burden of proving the existence of the corporation is on the plaintiff, and to overcome such plea a compliance must be shown with the statutory requirements for the formation of the corporation.

SAME.—Evidence of the parol admission by the defendant of the existence of the corporation will not supply the lack of proof that the statutory requirements have been complied with.

SAME.—A party cannot complain of the rejection of evidence offered, where the record shows that he has not been injured by its rejection.

SAME.—When evidence is offered tending to prove only one of several facts necessary to a recovery, it is not error to reject it when no offer is made, either in connection with the rejected evidence or otherwise, to prove the other essential facts.

From the Marion Circuit Court.

Hendricks, Hord & Hendricks and Test, Burns & Wright,
for appellant.

J. E. McDonald and J. M. Butler, for appellee.

WORDEN, J.—Complaint by the appellant against the appellee on the following paper subscribed by the defendant.

“ Articles of association of the Indianapolis Furnace and Mining Company, organized for the purpose of operating in the counties of Marion and Clay, in the State of Indiana.

“ Article First. The name of said company shall be the Indianapolis Furnace and Mining Company.

“ Article Second. The capital stock of said company

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shall be one hundred thousand dollars, and be divided into shares of fifty dollars each, to be paid for in such amounts and at such times as may be ordered by the board of directors.

"Article Third. The stockholders shall elect directors, who shall from their number elect a president, secretary, and treasurer, who shall hold their office for one year and until their successors are elected and qualified.

"Article Fourth. The board of directors shall have the control and management of the business of the company, except as they may appoint some one or more persons to take charge of the same, in which case the record of the action of the board in appointing them shall be evidence of their authority to act for said company.

"Article Fifth. The board of directors shall have power to make assessments on stock, collect the same, issue certificates therefor, and declare and pay dividends, which shall be at least twice a year.

"Article Sixth. All the expense incurred by the company shall be paid, and all the indebtedness of the same shall likewise be discharged before any dividends shall be paid to the stockholders, unless the directors shall direct otherwise.

"Article Seventh. We, the undersigned, hereby subscribe to all the foregoing articles, provisions, conditions, and stipulations, and agree to the organization of a company as therein stated, binding ourselves to take and pay for the number of shares of stock set opposite our names respectively, and pay for the same at such times and in such amounts as the board of directors may order the same to be paid for, without relief from valuation or appraisement laws.

Subscribers' Names.	No. of Shares.
"J. D. Herkimer, by D. Root,	100."

There were three paragraphs in the complaint, each counting upon the same instrument, in each of which it was alleged that at the time of the execution of the instrument

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by the defendant, the plaintiff was a duly organized corporation; but it is not alleged in either paragraph that after the execution of the instrument any steps were taken to perfect the organization.

The defendant demurred to each paragraph, assigning for cause the want of a statement of sufficient facts, but the demurrers were overruled, and the defendant excepted.

The defendant then answered,

1. By general denial.

2. *Nul tiel corporation.*

3. *Nul tiel corporation*, setting out specially the omission of the performance of the acts required by the statute, in order to perfect the corporate organization.

4. A denial of the execution of the instrument, sworn to.

It appears by the entries of the clerk, though not by any bill of exceptions, that the plaintiff moved in writing to strike out the second and third paragraphs of the answer, "for the reason that the first and fourth present the whole question," but that the motion was overruled, and the plaintiff excepted. A reply in denial was then filed to the second and third paragraphs of the answer.

Trial by the court, finding and judgment for the defendant, the plaintiff having unsuccessfully moved for a new trial.

The overruling of the appellant's motion to strike out the second and third paragraphs of the answer is, amongst other things, assigned for error. Conceding that this question is in the record, the motion was properly overruled, because the ground on which it was made is not tenable. The first and fourth paragraphs, being mere denials, did not "present the whole question." The general denial does not put in issue the existence of the corporation. *Cicero Hygiene Draining Company v. Craighead*, 28 Ind. 274, and authorities cited. Perhaps the paragraphs were in abatement, and should, therefore, have been sworn to. See *Heaston v. The Cincinnati, etc., Railroad Co.*, 16 Ind. 275. But no question

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was made in this respect, nor was the validity of the paragraphs in any way brought in question.

We may properly here notice another proposition, which, though not perhaps directly involved, is in some measure connected with the motion for a new trial. We are of opinion that a radical error was committed in overruling the demurrers to the several paragraphs of the complaint. The articles of association signed by the defendant, including his subscription for stock, were very clearly mere preliminary articles, contemplating a future perfection of the organization as a corporation. The defendant's contract did not purport to be with an existing corporation, but with one to be brought into existence in the future. The averment in the complaint that the plaintiff was, at the time the subscription was made, an existing corporation, cannot change the nature and legal effect of the defendant's contract. That contract was, in legal effect, that the defendant would take and pay for the stock subscribed for, in case the organization should be perfected and the corporation brought into legal existence, and not otherwise. Such preliminary subscriptions seem to enure to the benefit of the corporation when formed. *Heaston v. The Cincinnati, etc., Railroad Co., supra.*

But unless the subsequent steps, necessary to bring into existence the corporation, were taken, there was no corporation to whose benefit the contract could enure, and the defendant could not be liable; and it should have been averred in the complaint that such steps had been taken. *Wert v. The Crawfordsville and Alamo Turnpike Co., 19 Ind. 242; Williams v. The Franklin Township Academical Association, 26 Ind. 310.*

In such case, the estoppel growing out of a contract with a party as an existing corporation does not apply. In the case last cited, the court say:

"This rule of estoppel does not apply to a suit brought on a subscription made with a view to the organization of a corporation, and as preliminary thereto, where other acts

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are required by the law as a condition precedent to the exercise of corporate powers."

The first and second sections of the act for the incorporation of manufacturing and mining companies (I G. & H. 425), under which the appellant claims to have been organized, are as follows:

"Section 1. Be it enacted," etc., "that whenever three or more persons may desire to form a company to carry on any kind of manufacturing, mining, mechanical, or chemical business, they shall make, sign, and acknowledge, before some officer capable to take the acknowledgment of deeds, a certificate in writing, which shall state the corporate name adopted by the company, the objects of its formation, the amount of the capital stock, the term of its existence, not, however, to exceed fifty years, the number of directors, and their names, who shall manage the affairs of such company for the first year, and the name of the town and county in which its operations are to be carried on, and file the same in the office of the recorder of such county, which shall be placed upon record, and a duplicate thereof in the office of the secretary of state.

"Sec. 2. When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, and by their corporate name may take, hold and convey real estate necessary to carry on the operations named in such certificate."

It will be seen by these provisions, that the corporations contemplated by the act do not come into existence until the certificate provided for shall have been filed in the office of the proper recorder, and a duplicate thereof in the office of the secretary of state.

Now, although the complaint was held good, the pleas of *nul tiel corporation* put in issue the existence of the corporation; and we think, under the issues, the plaintiff was bound to prove such existence by showing a compliance with the statutory requisites. The burthen was on the plain-

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tiff, because the defendant was not estopped by his contract to dispute the existence of the corporation, and because the perfection of the organization was a condition precedent to the plaintiff's right to recover.

We now proceed to consider the ground, upon which it is claimed that a new trial should have been granted. There were six reasons assigned for a new trial. The first, second, and sixth involve nothing but the question whether the finding was in accordance with the evidence.

With reference to these, it is only necessary to say that they are without foundation, for the reason, as we shall hereafter see, that the plaintiff failed to prove the legal organization of the corporation.

The other reasons are as follows:

"3d. The court erred in refusing to allow the plaintiff to introduce in evidence the subscription articles and list signed by all the stockholders, including the defendant Herkimer.

"4th. The court erred in refusing plaintiff to introduce in evidence the certificate of association of members constituting their corporation, which was filed and recorded in the recorder's office of Clay county, Indiana, July 10th, 1867.

"5th. The court erred in refusing to hear the testimony of Horace W. Hibbard, to the effect that defendant told him that he had five thousand dollars of the stock of said company, and offered to trade the same to him."

A bill of exceptions shows that the evidence specified in the reasons set out was offered and rejected.

One of the objections made to the introduction of the articles of association containing the defendant's subscription was, that the plaintiff had offered no evidence of the filing of the certificate required by the statute above quoted in the offices of the recorders of Clay and Marion counties, and of the secretary of state. The ground on which the certificate filed in the office of the recorder of Clay county was rejected does not appear.

We have not examined this certificate carefully, in order

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to ascertain whether it meets the requirements of the statute, but it shows, like the articles of association, that the operations of the company were to be carried on in the counties of Clay and Marion. There was no evidence given or offered that the certificate or a duplicate thereof had ever been filed, either in the office of the recorder of Marion county or of the secretary of state.

It would seem that, under the statute quoted, where a company purports to be organized to carry on its operations in several counties, the certificate should be filed in all of them. This, however, need not be determined. The filing of the certificate in the office of the secretary of state is an indispensable prerequisite to the legal existence of the corporation.

The evidence of Hibbard was properly rejected, because such recognition by the defendant of the existence of the corporation could not estop him to controvert the fact; nor could it supply the omission of an act which the law requires to be performed before the corporation can be called into being.

But the two documents offered and rejected were proper links in the chain of the plaintiff's evidence. It does not appear to have been claimed by the plaintiff, however, that she had the right to marshal her evidence, and introduce it in such order as might suit her convenience. There was no offer to prove, either in connection with the rejected evidence or otherwise, the necessary fact that the certificate had been filed in the office of the secretary of state, or that it had been filed in the office of the recorder of Marion county.

Suppose all the evidence offered had been admitted, still the plaintiff would not have been entitled to recover, because of the failure to prove a fact essential to the existence of the corporation. Such being the case, it is difficult to see that the plaintiff was in any way injured by the rejection of the evidence. A party cannot complain of the rejection of testimony, unless the record show that he was injured by its rejection. *Lett v. Horner*, 5 Blackf. 296.

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We are of opinion, therefore, that the rejection of the evidence was not such an error as entitles the appellant to a reversal of the judgment.

The judgment below is affirmed, with costs.

November term, 1873.

ON PETITION FOR A REHEARING.

WORDEN, C. J.—The appellant has filed a petition for a rehearing in this case, claiming, as we understand the argument, that as it was shown by averment and proof, that the defendant's contract was made with an existing corporation, it should be treated as such; and therefore it was unnecessary for the plaintiff to show that the proper steps had been taken to perfect the organization of the corporation.

In the original opinion, we set out in full the contract entered into by the defendant. That contract very clearly was not with an existing corporation. It contemplated a future organization of the corporation, to which he was to become liable on his subscription. To treat him as having promised to pay the amount of his subscription to a corporation which then existed, would be to make a new contract for him in place of the one which he made for himself. There may have been a corporation of the same name, and organized for the same purpose, in existence at the time the defendant made his contract; but if so, the contract set out was not made with such existing corporation. That contract was to pay a corporation to be thereafter organized and brought into existence. The ground upon which a party who has contracted with a corporation as such is estopped to deny its existence, is, that by his contract he has recognized the existence of the corporation.

The contract in question, instead of purporting to be made with an existing corporation, utterly excludes the idea of its present existence, but contemplates the future organization of the corporation, to which he was to pay the amount of his subscription.

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The legal effect of a written contract cannot be thus changed by averment or parol evidence.

The petition for a rehearing is overruled.

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187 561
187 581
46 150
147 198

FULK v. THE BOARD OF COMMISSIONERS OF MONROE COUNTY.

CONSTITUTIONAL LAW.—Fee and Salary Act of 1871.—The fee and salary act of 1871, Acts 1871, p. 25, is not unconstitutional because it makes the salary of the sheriff payable out of the fund denominated therein the county officers' fund, or because the amount of said fund may be less than the amount of salary and deputy hire on account of the deficiency of the fund or of the amount paid in by the sheriff; but said act violates section 22, of article 4 of the constitution, by making the salaries of sheriffs ununiform. Under said act, therefore, the sheriff is not a salaried officer.

SAME.—Payment of Fees into Treasury by Sheriff.—The provision of the fee and salary act of 1871, Acts 1871, p. 25, requiring the sheriff to pay his fees into the county treasury is unconstitutional. The fees when collected by the sheriff are his own.

From the Monroe Circuit Court.

Claypool & Chapin, R. A. Fulk, W. A. Foland, Buskirk & Norton, and J. H. Louden, for appellant.

E. K. Millen, for appellee.

OSBORN, J.—This was an action by the appellant against the appellee, to recover a balance claimed to be due him for his salary and deputy hire as sheriff of Monroe County, under the fee and salary act of 1871, Acts 1871, p. 25.

The averments in the complaint show that the appellant was sheriff of the county of Monroe from November, 1870, until November, 1872, and that he was acting under the act before mentioned from the time it took effect until the expiration of his term of office; that he had complied with all the provisions and requirements of the act as such sheriff; that the population of the county was fourteen thousand; that he had kept a deputy, at the rate of four hundred dollars per year, and that the whole amount due him for his sal-

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ary and deputy hire during that period was three thousand two hundred and thirty-two dollars and sixty-five cents. It also appears that the amount of fees and charges collected by him and paid into the county treasury, after deducting the twenty per cent. commission allowed by the act, was one thousand seven hundred and sixty-four dollars and seventy-nine cents ; that the county commissioners allowed him the sum of one thousand seven hundred and sixty-four dollars and seventy-nine cents, and refused to make him any further allowance. He claims the sum of one thousand four hundred and sixty-seven dollars and eighty-six cents, the balance of his salary and deputy hire. A proper demand and refusal are averred in the complaint.

To this complaint the defendant demurred, upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained ; the appellant excepted, refused to amend, and final judgment was rendered against him. This ruling is the only error assigned.

The act fixed the amount which the sheriff was entitled to collect as fees and the time and manner of collecting such fees. It also required him to pay all fees collected by him into the county treasury. It provided that he should be allowed the sum of fifteen hundred dollars annually for his services as such sheriff, and when the population of his county exceeded ten thousand, the sum of one hundred dollars for each one thousand inhabitants or fraction thereof over five hundred, over ten thousand, and in addition thereto a commission of twenty per cent. of all his own costs collected and paid to the treasurer, as in the act provided. The money paid into the treasury was required to be kept as a distinct fund, with other moneys, paid for the same purpose, to be known as the county officers' fund. By section 30, it was provided that the board of commissioners should, at each of their regular sessions, allow the clerk, sheriff, auditor, and treasurer one-fourth of their salary, and one-fourth of the deputy hire, payable out of the county officers' fund, if the same should be sufficient therefor. But it was also

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expressly provided that such allowances to the sheriff and clerk should in no case exceed the amount paid into the treasury by such clerk and sheriff, with certain exceptions, which are not material to this case and need not be noticed.

It is claimed by the appellant that, under the law, the sheriff was entitled to the full amount of fifteen hundred dollars as salary, and four hundred dollars for deputy hire, without regard to the county officers' fund, or the amount contributed to that fund by him, and that so much of the act as made the sum payable out of that fund, and limited the amount to which he was entitled to the amount paid in by him, is unconstitutional.

The only authority which the county commissioners had for making any allowance was derived from the provisions of the law in question. The salary is allowed and the commissioners authorized to make the appropriation to pay it out of the county officers' fund, under the conditions and limitations specified in the act. No authority is given to the board to make the allowance payable out of the county treasury or any other than the fund mentioned. The provision of the law is not unconstitutional because it makes the officers' salary payable out of the particular fund, or because the amount may be less than the full amount of his salary and deputy hire, on account of the deficiency of the fund or the amount contributed by him.

The reasons urged might have some weight in determining the constitutionality of so much of the act as required the sheriff to pay his fees into the county treasury. That question was before this court in *Wallace v. The Board of Commissioners of Marion County*, 37 Ind. 383. The members of the court, as it was then constituted, were equally divided on that question. DOWNEY and BUSKIRK, JJ., holding the provision constitutional, whilst WORDEN, C. J., and PETTIT, J., held it to be unconstitutional. The majority of the court now concur in the opinion of WORDEN, C. J., in that case, and hold that the provision of the law requiring

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the sheriff to pay his fees into the county treasury is unconstitutional.

In addition to the reasons given in that opinion, we think it may be urged, that whilst the act purports to fix the salaries of the sheriffs, it fails to make them uniform and violates section 22, article 4, of the constitution of the State. The amount may be fifteen hundred dollars, and it may be less. It is uncertain what it will be. It depends entirely upon the amount collected. He cannot take from the fund as salary more than he pays in as fees. If fees are not collected, the officer gets no salary. In form, he is paid by a salary, but in reality it is by fees only. In our opinion, the act fails to fix a salary for the sheriff within the meaning of the section of the constitution above referred to, and that he is not a salaried officer. The fees when collected are his, and he is not bound to pay them into the county treasury.

In the case under consideration, the averments in the complaint show that the appellant has received from the county all that he had paid into its treasury.

The judgment of the said Monroe Circuit Court is affirmed, with costs.

KERNODLE v. CALDWELL, ADMINISTRATOR.

CONTRACT.—Promise to Pay Board of Adult Daughter.—A father is liable for the board of his daughter over twenty-one years of age, if furnished at his request, though no promise to pay such board be made in writing.

SAME.—Nor will the fact that the daughter in such case may have taken up her home with the party furnishing such board, and rendered services for such party without expectation of charging for the same, or being charged for board, relieve the father from his liability, if the board was furnished at his special instance and request.

PRACTICE.—Demurrer.—It is error to overrule a demurrer to a special paragraph of a reply, if the facts are not sufficient to bar the answer, though proof of the facts might be admissible under the general issue pleaded.

46	153
136	350
46	153
136	177
46	153
139	186

Kernodle v. Caldwell. Adm'r.

SAME.—*Partial Reply.*—A paragraph of reply which professes to reply to the whole answer, but which is a reply to only a part of the answer, cannot be sustained.

From the Boone Common Pleas.

A. J. Boone, R. W. Harrison, and O. S. Hamilton, for appellant.

J. A. Stein and Caldwell & Caldwell, for appellee.

DOWNEY, C. J.—This case was once before in this court, the parties being reversed. 34 Ind. 424. The action was by the appellee, as administrator of the estate of Zacheus Tiberghen, deceased, against the appellant, on two promissory notes, and there was judgment for the plaintiff. The defendant pleaded by way of set-off, that the plaintiff's intestate was indebted to him in the sum of fifty dollars, for services rendered in collecting money and securing and renewing notes for him at his special instance and request; in the sum of eleven hundred dollars, for taking care of, boarding, washing, and various other services performed at the special instance of the deceased and his family, a bill of particulars of which was filed; which he asked might be allowed as a set-off against the notes, and for judgment for any overplus. In the bill of particulars, the items are set forth as follows:

To collecting money, loaning the same, and services performed in and about the same,	\$25.00
To taking care of said deceased and his wife, Mary Tiberghen, boarding and washing for same, from about the 1st of November, 1853, and continuing twenty-four weeks, at three dollars each per week,	144.00
To keeping and feeding two horses for said deceased from the 24th of November, 1853, and continuing from that date for twenty-four weeks, at two dollars per week,	48.00
To boarding, washing, mending boots and shoes, making clothes and mending same, of deceased, and feeding and caring for one horse beast, for six	

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months and eighteen days, commencing in October, 1858, and continuing until May 28th, at two dollars and fifty cents per week,	70.00
To boarding, washing, mending boots, shoes, and clothes, and taking care of deceased, and feeding and caring for one horse beast, four months and five days, at two dollars and twenty-five cents per week, from November 1st, 1859, to April 28th, 1860,	32.00
To same kind of services as above, from November 1st, 1860, to May 10th, 1861, four months and twenty-four days, at two dollars and fifty cents per week,	68.00
To same kind of services as above, from October, 1861, to May 5th, 1862, being four months and ten days, at two dollars and fifty cents per week,	38.00
To same kind of services as above set out, from October, 1862, to May 5th, 1863, for five months, at two dollars and fifty cents per week,	45.00
To same kind of services as above set out, from October, 1863, to May 1st, 1864, three months and fourteen days, and also for daughter of deceased, Mary Tiberghein, for boarding and washing for said Mary, at the special instance and request of the deceased, at three dollars and seventy-five cents for all,	56.25
To same kind of services for deceased and horse, as above set out, from June 13th, 1864, to June, 1865, for six months, at two dollars per week,	52.00
And, at special instance and request of the deceased, in boarding, nursing, washing, and other expenses during the last sickness of said Mary Tiberghein, the daughter, from June 1st, 1864, to October 19th, 1864, sixty days, at one dollar per day, and eighty-one days, at two dollars per day,	222.00
To boarding Mary Tiberghein, at the special instance and request of the deceased, at different times in	

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1860, 1861, 1862, and 1863, in all two years and a half,	400.00
	\$1200.25
And on which there should be a credit for Mary for clothes, etc.,	50.00

Balance, - - - - - \$1150.25

We have set out the items of account thus at length, in order that it may be seen whether the fourth paragraph of the reply was sufficient or not. A demurrer to that paragraph was filed by the defendant and overruled by the court. That paragraph of the reply was as follows:

"And for further reply to the answer of defendant, the said Caldwell avers that the said decedent, Zacheus Tiberghen, was the father-in-law of the said John W. Kernodle, he having married the daughter of said deceased long before said Tiberghen, his wife, and daughter were furnished any of the board or care and attention mentioned in said Kernodle's claim, and that during the whole period of the furnishing of said board, care, and attention and services, said Kernodle and the said daughter of said deceased were man and wife and kept house themselves; that at such time as the decedent lived at the house of said Kernodle and received board, washing, mending, and clothes, and other services mentioned in defendant's answer, he lived there as a member of said defendant's family, being invited there by defendant, and working for defendant, neither expecting to charge said defendant for his work and labor nor expecting to be charged for his board, cow, or horse, nor any services rendered him at such times by defendant or his family; and that at all of such times he was there without any contract, express or implied, to pay for such board or services rendered, but visited and lived with said daughter and son-in-law as a member of the said family; that at the time the wife of said decedent, Mary Tiberghen, during parts of 1853 and 1854, stopped at said Kernodle's house and was furnished board,

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care, and attention as in the answer mentioned, she had gone there on a visit to her said daughter and son-in-law by their request, and remained with them as a member of said family, and without any contract, express or implied, to pay for said board or services, etc., in fact, said Kernodle never expecting or intending, at the time, to charge said decedent for said board, services, etc., but simply acting the part of an affectionate son, and never concluded to charge for the same until after the death of said deceased; that as regards that part of said claim relating to board, care, and attention rendered to Mary Tiberghien, said administrator avers, that at the time said care, attention, services, etc., were rendered by said Kernodle, the said Mary, daughter of said deceased, was of full age, that is, over the age of twenty-one years; that said decedent never signed any instrument of writing, by which he agreed to pay the said indebtedness of said Mary, if any indebtedness existed; but on the contrary he avers, that for a long time before the said last illness of said Mary, she had taken up her home with said Kernodle, he being her brother-in-law, and worked and rendered various services for said Kernodle and his wife about housekeeping, cooking, washing, etc., and never expected to charge for said services and never expected to be charged for her board, care, and attention bestowed as claimed; but plaintiff avers that said Mary at all such times lived with said Kernodle as a member of his family and without any contract express or implied to pay for said board; wherefore," etc.

We are of the opinion that the court erred in overruling the demurrer to this paragraph of the reply, and that for this reason the judgment ought to be reversed.

Taking the bill of particulars as a part of the answer, it will be seen that the board, etc., of the daughter of the deceased, Mary Tiberghien, was furnished at the special instance and request of the deceased. It is replied to this, that the said Mary was over twenty-one years of age, and that said deceased never signed any instrument of writing by which he agreed to pay the said indebtedness of said

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Mary. This is no sufficient reason why he should not pay it, if the board, etc., were furnished at his special instance and request. A parent may be liable for the board, etc., of a daughter over twenty-one years of age, if furnished at his request. Nor is the fact that said Mary had taken up her home with said Kernodle, and worked and rendered various services for him and his wife and never expected to charge for her services or to be charged for her board, etc., lived as a member of his family and without having made any contract to pay for her boarding, etc., any sufficient reason.

There was a general denial of the answer, in the reply, and perhaps the fourth paragraph was unnecessary, and might have been struck out on motion. In fact, the defendant did move to strike it out, but the court overruled his motion. Counsel for appellee say, with reference to striking it out: "It might prejudice the ends of justice to strike it out, and its retention can certainly not prejudice a party who admits that all its matter might be put in evidence under the general denial."

We cannot concede the correctness of this position. The matters set up in a special paragraph of a reply may be admissible in evidence under the general denial, and yet such matters may not be a bar to the answer. It is not necessary to say to the learned counsel in this case, that a special paragraph of a reply which professes to reply to the whole answer, and is a reply to a part only, cannot be sustained. Such, we think, is the character of the paragraph in question. Conceding that the paragraph sufficiently meets the other items of the account, which we need not decide, it is clear that it does not meet that part of the account for the board, etc., of the daughter of the deceased. It ought to be stated that the pleadings in this case are those of two actions consolidated, and for this reason may not be as accurate as they otherwise would have been:

There are several other questions discussed, arising under the motion for a new trial and the overruling thereof, but as

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a new trial must result from our ruling on the point already decided, we need not consider them.

The judgment is reversed, with costs, and the cause remanded.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

46	159
156	431
46	159
165	364

STALEY *v.* JAMESON ET AL.

STATUTE OF LIMITATIONS.—Contract.—Personal Injury.—A complaint charging that the defendants, in consideration of a certain sum paid them, as surgeons, undertook to attend to, care for, and heal a broken arm of the plaintiff, and that they so negligently and unskillfully conducted themselves that the arm was rendered worthless, etc., is a complaint upon the contract, and the action is not barred by the statutory limitation of two years for injury to the person, but the statutory limitation of six years is applicable.

From the Marion Superior Court.

D. V. Burns, for appellant.

A. G. Porter, B. Harrison, and C. C. Hines, for appellees.

OSBORN, J.—The appellant sued the appellees, and in his complaint alleged that they were partners, engaged in the practice of physic and surgery, in the city of Indianapolis; that he employed them to set and heal his arm, which was broken, and "for that purpose they undertook as surgeons, for the sum of one hundred dollars paid them by the plaintiff, to attend and care for him; that they so negligently and unskillfully conducted themselves in setting and attempting to heal and cure said arm as to impair and destroy the efficiency of and render the same almost worthless to plaintiff;" that by reason of such unskillfulness and negligence, the plaintiff was made sick and disabled from attending to his business, and put to great expense, etc., to his damage in the sum of ten thousand dollars.

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The appellees filed an answer of two paragraphs:

1. The general denial.
2. That the cause of action in the complaint described did not accrue within two years next before the commencement of this action.

A demurrer was filed to the second paragraph of the answer, which was overruled, and an exception taken. The appellant refused to reply, but elected to stand by his demurrer, and final judgment was rendered against him, and for costs.

The error assigned in general term of the superior court was in overruling the demurrer to the second paragraph of the answer, where the judgment of the special term was affirmed. The error assigned in this court is the error of the court below in general term in affirming the judgment of the special term.

The only question presented for our consideration is, whether the statutory limitation of two years applies to the cause of action in this case.

The statute, 2 G. & H. 156, sec. 210, enacts, that actions on account and contracts not in writing shall be commenced within six years after the cause of action has accrued, and not afterward; by sec. 211, p. 158, that actions for injuries to person or character, etc., shall be brought within two years after the cause of action has accrued, and not afterward; and by sec. 212, p. 160, that all actions not limited by any other statute shall be brought within fifteen years.

The appellees insist that the action is for a personal injury to the appellant, resulting from the alleged unskillfulness and negligence of the appellees. The opinion of the court below in general term is copied into the transcript. From that we learn that its ruling was based upon the theory that the *gravamen* of the action was the personal injuries resulting to the appellant from the omission of the appellees to exercise the care and use the skill in the discharge of their undertaking to care for his broken arm, which the law required of them upon the facts of the case, and not on a contract to

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properly treat the arm as surgeons; and that the employment for reward was set out in the complaint as matter of inducement only.

Prior to the adoption of the code and the abolition of the distinction between the forms of actions, it frequently became material to decide whether under the averments in a declaration the action sounded in contract or tort.

Dale v. Hall, 1 Wilson, 281, was an action against a shipmaster, or keelman, who carried goods for hire, and in the declaration it was averred that the defendant, at the special instance and request of the plaintiff, undertook to carry certain goods from one port to another, and that in consideration thereof the plaintiff undertook and promised to pay him therefor; that the goods were received by the defendant on his keel, but that they were so negligently kept by him that they were spoiled, to plaintiff's damage. The general issue *non assumpsit* was pleaded.

It was insisted that, the declaration not being upon the custom of the realm, but upon a particular contract, and the breach being, that by the negligence of the defendant the goods were lost, the gist of the action was the negligence. LEE, C. J., said: "This is a nice distinction. * * The declaration is, that the defendant undertook for hire to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence; this is no more than what the law says, everything is negligence in a carrier or hoyman that the law does not excuse, * * and a promise to carry safely, is a promise to keep safely." DENISON, J., said, that the law is very clear for the plaintiff; that the promise to carry safely need not be proved, the law raises it, and the breach was very right, that he did not deliver them safely, but so negligently kept them that they were spoiled.

Bretherton v. Wood, 3 Brod. & B. 54, was predicated upon the duty, and not the contract of the defendants. It was averred in both counts of the declaration that the defend-

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ants were the proprietors of a stage-coach, etc., and as such received the plaintiff as an outside passenger, to be safely carried, etc., and that by the carelessness and unskillfulness of the defendants and their servants the coach was overset and overturned, and the plaintiff thereby greatly injured, etc. A plea of not guilty was filed. Two of the defendants were proved not guilty, and the rest guilty. On error it was held, that judgment was properly rendered on the verdict; that the action was in tort for the breach of duty imposed by law, and not upon contract. DALLAS, C. J., says: "If it were true, that the present action is founded on a contract, so that, to support it, a contract between the parties to it must have been proved, the objection would deserve consideration. But we are of opinion, that this action is not so founded, and that, on the trial, it could not have been necessary to show that there was any contract, and therefore that the objection fails. * * Nor is it material, whether redress might or might not have been had in an action of *assumpsit*."

After distinguishing the case from several others, where it had been held that the action was joint, and showing that those cases were founded on contract, and stating that if the cases became opposed to each other, "it must remain to be decided hereafter which of them is right," he concludes: "At present, it is sufficient to say, that this action is founded on a misfeasance, and that the declaration is framed accordingly; and therefore, that the verdict and judgment given against some of the defendants is not erroneous, and ought to be affirmed."

It will be observed, that there was no averment in the declaration of any contract to carry the plaintiff by the defendants. The averment was, that being the proprietors of a stage-coach, they received the plaintiff as an outside passenger, to be safely carried, etc. Having received him as a passenger, they were bound to exercise proper care and skill in transporting him; and if by reason of any negligence on their part, the coach was overturned, and he thereby injured, they would be liable for his damage, not on account of their

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contract to carry him safely, but on account of a legal obligation to do so.

Mr. Chitty, in speaking of actions of tort, I Chitty Pl. 384, says, that in a declaration against a surgeon, etc., it is sufficient to aver that he was employed as such for reward, to treat and cure the plaintiff, and that he entered upon the treatment without showing any undertaking by defendant, or averring in words that it was defendant's duty to act skilfully, etc., and adds: "Care must be taken in declaring in case in actions of this nature, that the count be not framed as in assumpsit, laying a promise," etc. And the same author, in treating of the joinder of actions, in the same volume, on page 199, says, if the count objected to be for a non-feasance and breach of contract, and is substantially in assumpsit, though it omit the words "undertook and faithfully promised," yet it will be considered as framed in assumpsit; and if it be joined with other counts for torts, the misjoinder will invalidate the whole declaration.

In *Burnett v. Lynch*, 5 B. & C. 589, LITTLEDALE, J., on p. 609, says: "Assumpsit lies where a party claims damages in consequence of a breach of promise not under seal. That a promise may either be express or it may be implied from a legal obligation to do a particular act. Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the legal obligation itself, the breach of it, and the damage resulting from that breach."

Addison on Torts, p. 13, says: "A tort may be dependent upon, or independent of, contract. If a contract

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imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract; so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought at the option of the plaintiff."

Mr. Chitty, in his work on pleading, does not give a form for a declaration against a surgeon, but he gives several against an attorney, both in case and in assumpsit, and the only real difference between them is, that in the declaration in assumpsit, it is averred that the defendant undertook and faithfully promised, etc., and in case, it is averred that the defendant accepted and entered upon the retainer and employment, and it became and was his duty, etc.

In the case at bar, as we have seen, the appellees claim that the gist of the action of the appellant was the misfeasance of the appellees in the discharge of a duty imposed upon them by law, and not for a nonfeasance and breach of contract to treat the broken arm and care for the appellant; and we are referred to *Sherman v. Western Stage Company*, 22 Iowa, 556, as a case directly in point, to sustain their position and the ruling of the court below. In the statement of that case, it is said that the plaintiff's wife and child took passage in the defendant's line of coaches at Des Moines for Fort Dodge, and were drowned in crossing Boone River, in consequence of the alleged carelessness of the driver and employees of the defendants, and the insufficiency of their ferry-boat. To recover damages for this bereavement, the action was commenced. The court held that the cause of action, as it was declared and set forth in the petition or complaint, was for personal injuries to the wife and child of the plaintiff, resulting in their death, and sounding in tort, rather than contract, and that the statute of limitations applicable to actions for injuries to the person governed.

It does not appear by the statement of the case, that there was any contract by the defendant to carry the wife and child. It is simply that they took passage in the coach at Des Moines for Fort Dodge. It is very much like the case

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of *Bretherton v. Wood*, 3 Brod. & B. 54, and the court in its opinion admits that the question is not free from doubt, and the ruling is predicated upon the fact that the cause of action, as it is declared and set forth in the complaint, sounds in tort rather than contract.

In the case under consideration, it is averred in the complaint that the appellant employed the appellees to set and heal his arm, which was broken, and, for that purpose, they undertook, as surgeons, for the sum of one hundred dollars, paid them by him, to attend and care for him, and that they so negligently and unskillfully conducted themselves in setting and attempting to heal the arm as to impair and destroy its efficiency. We think the action was upon the contract. That a breach of the contract should result in impairing and destroying the efficiency of the appellant's arm, does not show that the gravamen of the action is an injury to his person within the meaning of section 211, 2 G. & H. 158. Actions on contracts not in writing must be commenced within six years next after the cause of action accrues. Actions for injuries to the person within two. The complaint in this case sets out a contract between the appellant and the appellees, by which they undertook to set and treat a broken arm for him for hire, and a breach of that contract, to his damage. The damage sustained by him by reason of such breach consisted in the loss of the use of his arm. To hold that an action in such a case is for injuries to his person, will be equivalent to holding that no action can be maintained against a surgeon on his contract to treat a broken limb or perform any other professional service, where the damage for the breach of such contract is a loss of the use of the limb or other injury to his health; that in all such cases the action must be for the tort.

The language used in the complaint is substantially that which was formerly used in a declaration in assumpsit. It is averred that the defendants, in consideration of one hundred dollars paid to them by him, "undertook" as surgeons to attend and care for him and set and treat his broken arm.

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In our opinion such language indicates a purpose to sue on the contract.

As was said in *Dale v. Hall, supra*, the distinction between actions *ex contractu* and *ex delicto* were often very nice, and many seeming conflicting decisions on the subject are found in the books. We think the court realized that in *Bretherton v. Wood, supra*, and that the judge felt somewhat embarrassed by it in writing the opinion. The conclusion of the court in that case was, however, that it was for the plaintiff to elect whether he would sue on the contract, or in tort founded upon it, and that the declaration was so framed as to make it an action *ex delicto*, and not *ex contractu*; and the same may be said of *Sherman v. Western Stage Company*, 22 Iowa, 556, *supra*. That case, like *Bretherton v. Wood*, was determined upon the language of the complaint. In both, it was held, that the plaintiff had sued for the tort; that the action was in form *ex delicto*. In this we hold that the plaintiff elected to sue on the contract, and that the statutory limitation of six years is applicable.

The judgment of the said Superior Court is reversed, with costs; the cause is remanded, with instructions, to that court in general term, to reverse the judgment of said court in special term, and direct the said court in special term to sustain the demurrer to the second paragraph of the answer, and for further proceedings, etc.

Petition for a rehearing overruled.

BLIZZARD v. HAYS.

46 166
124 128
125 506

EVIDENCE.—Malicious Prosecution.—Defendant's Knowledge of Plaintiff's Character.—In an action for malicious prosecution of the plaintiff on a charge of crime, it is competent for the plaintiff to introduce evidence to show that before and at the time of the prosecution complained of, he was a man of good moral character and reputation in the community in which he lived, and that the defendant had knowledge of this, as tending to show a want of probable cause.

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PRACTICE.—*Bill of Exceptions.*—*Objections to Evidence.*—The grounds of an objection to the admission of testimony must be shown by the bill of exceptions. It is not enough to say that an objection was made and the ground pointed out, without stating what the ground was.

From the Cass Circuit Court.

J. Applegate, for appellant.

D. Turpie, for appellee.

DOWNEY, J.—This was an action by the appellant against the appellee, for maliciously prosecuting him upon a charge of forgery. The complaint is in two paragraphs. The defendant answered in three paragraphs; the first of which was a general denial, and the others set up facts to show that there was probable cause for the prosecution. The plaintiff replied to the second and third paragraphs by general denial. A trial by jury resulted in a verdict for the plaintiff, and there was judgment thereon. Upon appeal to this court, the judgment was reversed. 30 Ind. 457. On a second trial of the cause, there was a verdict for the defendant, a motion for a new trial made by the plaintiff overruled, and judgment for the defendant. From this judgment, the present appeal is taken. The only error assigned is upon the action of the court in overruling the motion for a new trial.

One of the reasons urged for a new trial by the plaintiff was the refusal of the court to allow him to introduce evidence on the trial to show that he was, at and before the time of the prosecution complained of, a man of good moral character and reputation in the community in which he then resided, and that the defendant had knowledge of this, as tending to show a want of probable cause for the prosecution.

In *Shannon v. Spencer*, 1 Blackf. 526, the court say:

“Whether the plaintiff was at liberty to give evidence of her general character, is a question not very clear. The general rule that the plaintiff’s character is not in issue, and that it is presumed to be good until impeached by testimony, will admit of considerable modification, and many exceptions, when applied to actions of malicious prosecution. In

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the case of *Rodrigues v. Tadmire*, 2 Esp. Rep. 721, the defendant in malicious prosecution was permitted, in showing probable cause, to inquire if the plaintiff was not a man of bad character, and we see nothing inconsistent with justice in permitting this rule to operate in favor of the plaintiff; that she, in showing the want of probable cause, may show her general character to be good. In criminal prosecutions, the defendant is permitted to prove the goodness of his general character: see *Commonwealth v. Hardy*, 2 Mass. 317; and if he has given such testimony on the trial, and should bring an action for malicious prosecution, he may show all the testimony that was given on the trial, including (as a matter of course) the evidence of his good character; and it seems, under the same rule, that he might introduce such testimony, when he had not found it necessary to make use of it on the trial. We are aware of no reason that would restrain him in showing the want of probable cause, from using the same testimony by which he might defend himself against the prosecution. In malicious prosecution there seems more reason for the admission of such testimony than in other cases. They generally rest on the question of probable cause, which is frequently made up, or attempted to be made up, of a combination of circumstances, among which, character will always have considerable weight. We therefore see no good reason why either general good or bad character, at the time the prosecution was commenced, may not be proved in this action, when brought on account of criminal prosecution. But the doubt that hangs over the question may, for the present, be permitted to remain, as it does not appear absolutely necessary to remove it in this case."

The question seems purposely to have been left undecided in this case.

In *Israel v. Brooks*, 23 Ill. 575, it was decided that previous good character was admissible for the plaintiff to show that the defendant had not probable cause for the prosecution. The court say:

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"The onus is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution—no such reasonable ground of suspicion sufficiently strong in itself, as to warrant a cautious man in believing that the person arrested is guilty of the offence with which he is charged. *Jacks v. Stimpson*, 13 Ill. 701; *Richey v. McBean*, 17 Ill. 63; *Hurd v. Shaw*, 20 Ill. 356. What these circumstances may be, cannot be specified, but we would think, among them, the good character of the party accused would stand out prominently. All must admit that is, and must be, a strong fact, if known to the accuser, to ward off suspicion, and therefore, for this purpose, it is entirely competent for the plaintiff in the action, in his opening proofs, to show that his character was good, and known to be so by the defendant, when he made the accusation. As the onus of proving a negative—the absence of probable cause—is thrown upon the plaintiff, slight evidence will usually suffice for such purpose. But the evidence of an uniform good character up to the time of the charge, is something more than slight evidence, and the plaintiff should have the benefit of it. If known to the prosecutor, what single fact is better calculated to weaken a belief, he being a prudent man, in the guilt of the suspected party? On the other hand, his bad character may be shown by the defence, as good ground for augmenting a suspicion against him. We know, in no actions save criminal prosecutions and actions for defamation, can the character of the party, as a general rule, be inquired into, but in such a case as this, there seems to be great propriety in permitting it, for the reasons here given."

Had the plaintiff been on trial upon an indictment for the crime of forgery, it is well settled that he might have introduced evidence of his good character as a circumstance tending to show that he was not guilty. Roscoe Crim. Ev. 94, and note 1. It is held, however, in such cases, that the character of the prisoner cannot be put in evidence by the State,

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unless he opens the door, by first introducing evidence of character himself.

From the analogy of the case, it would seem to follow that in an action for malicious prosecution, the plaintiff should be allowed to give evidence of his good character, and that the same was known to the defendant, as a circumstance tending to show a want of probable cause for the prosecution. The defendant might, no doubt, meet this by evidence of his bad character. We are not called upon in this case to decide whether the defendant could or could not give evidence of the bad character of the plaintiff, before the plaintiff has opened the door, as that question is not before us. What we do decide on this branch of the case is, that the evidence offered by the plaintiff of his good character at the time of the prosecution, and that his good character was known to the defendant, should have been admitted.

Another ground of the motion for a new trial is, that the court allowed the defendant, who was a witness for himself on the trial of the cause, to testify, notwithstanding the objection of the plaintiff, that he instituted the prosecution complained of in no spirit of malice, and that his intentions and motives in instituting the prosecution, and in prosecuting the same, were good.

Counsel for the appellant contends that if the defendant can, by merely swearing that his motives were pure and upright, exculpate himself, he will always go acquit; that it may be impossible to impeach or contradict him, by showing the state of his mind or feelings, as no one but himself can know, except from his acts and declarations, what his motives and feelings were; and that intention is a fact to be ascertained by the jury from all the facts and circumstances disclosed by the testimony, and not by the mere oath of the party. Had these objections been made in the circuit court to the introduction of the evidence, they might have prevailed with the court. But the bill of exceptions, while it states that an objection was made and the ground of objection pointed out, does not show what the ground of objec-

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tion was. We think the practice requires that the objection made to the evidence and the ground of it shall be shown by the bill of exceptions, and that it is not enough to state simply that an objection was made and the ground pointed out, without stating what the ground of it was. Otherwise, one objection might be made in the circuit court and another considered in this court. We cannot regard this point as properly before us, for the reason stated.

Having decided that there was one good reason why the new trial should have been granted, we do not deem it necessary, at present, to decide whether the other grounds relied upon were well founded or not.

The judgment is reversed, with costs, and the cause remanded for a new trial.

SHAFER ET AL. v. CRAVENS.

From the Tipton Common Pleas.

C. N. Pollard, N. R. Overman, N. W. Parker, and F. T. Cox, for appellants.

J. Green and D. Waugh, for appellee.

PETTIT, J.—In all legal respects, this case is the same, and involves the very questions, as the case of *Shafer v. Moriarty*, *ante*, p. 9; and on the authority of that, this is reversed, at the costs of the appellee, with the same instructions to the court below.

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CHECK.—Form.—When Payable.—A written instrument reading as follows is a check, and not a bill of exchange, and is payable on demand: "COLUMBUS, Ind., Jan. 17th, 1871. First National Bank of Columbus, Indiana, pay to" A. "or order, fourteen hundred and ten dollars and twenty-six cents, as per deposit on the above date." (Signed) B.

SAME.—Protest not Necessary.—No protest of a check is necessary in case of its non-payment.

SAME.—Notice of Dishonor.—Damages from Failure to Give Notice.—When demand of payment of a check has been made and refused, it is the duty of the holder to give notice of the dishonor of the check, but a failure so to do will not discharge the drawer, unless damages result to him from the delay, and then only to the extent of the damages sustained.

SAME.—Action on Check.—Pleading.—Notice of Non-Payment.—In an action by the holder of a check against the drawer, when payment has been refused, the complaint must show that notice was given of the non-payment of the check, or aver a legal excuse for not giving notice.

PLEADING.—Complaint.—A complaint or paragraph of a complaint must show a cause of action in favor of all who are joined as plaintiffs.

SAME.—Complaint on Check.—Answer of Set-Off.—To a complaint by a husband and wife, on a check payable to A. & Co., wherein it is alleged that the wife is in business with other parties, under the firm name of A. & Co., but that the check is her individual property, in which the other members of the firm have no interest, and that it was drawn payable to A. & Co. by mistake, an answer in the form of a cross bill, alleging that the check was given for certain notes bought of A. & Co., and represented by the plaintiffs to be the property of A. & Co., which notes were indorsed to the defendant in the name of A. & Co., and claiming to set off the amount of a note made by A. & Co., and held by the defendant, is good.

PRACTICE.—Joint Demurrer.—Where a demurrer is joint to all the paragraphs of an answer, if one paragraph is good, the demurrer should be overruled.

From the Decatur Common Pleas.

J. Gavin and J. D. Miller, for appellant.

S. A. Bonner, J. L. Bracken, and S. Stansifer, for appellees.

DOWNEY, J.—This was an action by Matilda Kemp and David Kemp against Charles Griffin, Mathew Wilson, Joseph Garard, and Hiram Solomon. The complaint contained three paragraphs, to each of which there was a demurrer by the defendant Griffin; all of which were overruled by the

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court. Griffin then answered the general denial and five special paragraphs. The plaintiffs demurred to the second, third, fourth, fifth, and sixth paragraphs of the answer, and all these paragraphs were held bad. The defendants, other than Griffin, made default. He withdrew the general denial which he had pleaded, and there was final judgment for the plaintiffs. The errors assigned are the overruling of the demurrer to the several paragraphs of the complaint, and the sustaining of the demurrer to the second, third, fourth, fifth, and sixth paragraphs of the answer.

In the first paragraph of the complaint, the plaintiffs allege that they are husband and wife; that on the 17th day of January, 1871, the defendant Griffin made his draft or order in writing, as follows:

“COLUMBUS, Ind., Jan. 17th, 1871.

“First National Bank of Columbus, Indiana, pay to Matilda Kemp & Co., or order, fourteen hundred and ten dollars and twenty-six cents, as per deposit on the above date.

“CHARLES GRIFFIN.”

It is alleged that this draft or order was afterward presented to said bank for payment; that the bank did not and would not pay the same or any part of it, but wholly neglected and refused so to do, and that the same remains wholly unpaid. It is further alleged, that said Matilda was at the time of making said paper in business with said Mathew Wilson, Joseph Garard, and Hiram Solomon, under the name of Matilda Kemp & Co., but said firm had no interest in the consideration of said check, and had not then, and have not now, any interest in said check; that the same was, when it was made, has been since, and still is, the individual property of said plaintiff Matilda Kemp, wife of said David Kemp; that when the check was drawn by the agent of the defendant, the same was inadvertently, by mistake, or wrongfully and fraudulently drawn payable to Matilda Kemp & Company, or order, when the same should have been made payable to said Matilda Kemp individually. Prayer that the check be reformed, so as to be made payable to said Matilda.

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Kemp, instead of being payable as it is; that said Wilson, Garard, and Solomon answer as to their interest in the same; and that the said Matilda may have judgment against Griffin for fifteen hundred dollars, etc.

Two objections are urged to this paragraph of the complaint. First, that the check is payable on a day certain, and no demand at the bank on that day is alleged. And, second, that it is not alleged that any notice was given to the defendant Griffin of the dishonor of the check.

Considering the frequent use of checks, few cases, comparatively, involving the doctrine relating to them, have been decided in this court. A check is defined to be a written order, or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument. It has been said that checks have many resemblances to bills of exchange, and are, in many respects, governed by the same rules and principles as the latter. But *nullum simile est idem*, and their nature, obligation, and character are in some respects different from those of common bills of exchange. The circumstances in which they principally differ from bills of exchange, or at least from bills of exchange in ordinary use and circulation, are: 1st. They are always drawn on a bank, or on bankers, and are payable on presentment without any days of grace. 2d. They require no acceptance as distinct from prompt payment. 3d. They are always supposed to be drawn upon a previous deposit of funds, etc. Story Prom. Notes, sec. 489; *Lester v. Given*, 8 Bush, 357. A check so far differs from a bill of exchange or note, that its payment may be countermanded by the drawer before it is accepted or paid by the bank; and so the death or insolvency of the drawer is in the nature of a countermand of the payment, and the bank ought not to pay; but if the bank pays without notice of the death, it is said to be a good payment. *Id.*, sec. 498a; Morse on Banks, etc., 278. Although there are

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cases to the contrary, it seems clear upon principle and by the great weight of authority, that the holder of a check can not sue the bank for refusing payment, in the absence of proof that the check was accepted by the bank, or the amount thereof charged against the drawer. *Bank of the Republic v. Millard*, 10 Wal. 152.

There has been considerable discussion upon the question whether if such an instrument be drawn payable so many days after date, or at a fixed day in the future, it is to be regarded as a check, or as a bill of exchange. Morse on Banks, etc., 241, *et seq.*

But this question was long ago settled in this State. In *Glenn v. Noble*, 1 Blackf. 104, the check was drawn on the cashier of a bank, payable fifteen days after date, and it was said: "This check must be received as an inland bill of exchange. It has every feature of such a bill, and the rules of decision applicable to the one must govern the other." Counsel is under a misapprehension in stating that the check in the case under consideration is payable on a day certain, and that demand at the bank on that day was essential to render the drawer liable. Checks are generally drawn substantially in the form used in this instance. But whether they are drawn in this form, or on demand, they are equally payable on demand. Judge STORY says: "They are usually in England, and almost invariably in America, made payable without the addition of the words 'on demand'; and then they are, in contemplation of law, equally payable on demand." The instrument in this case is a check, and not a bill of exchange. There is an important difference with reference to the consequences of a failure of the holder of a bill and of a check to present the same for payment, and to give notice of their dishonor. If demand of payment of a bill be not made, or if notice of non-payment thereof be not given, as required by the rules of the commercial law, the drawer is discharged, whether any damage resulted to him from such failure or not. The law presumes that he was damaged, and no evidence is admissible on that subject. If the payee or other

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holder of a check receives it immediately from the drawer, in the same town or city where it is payable, he is bound to present it for payment to the bank or bankers, at furthest, on the next succeeding secular day after it is received, before the close of the usual banking hours. He may, however, although he is not bound so to do, present it for payment on the same day on which it is drawn or delivered to him; but he is at liberty to wait until the next succeeding day. Where he receives the check from the drawer in a place distant from the place of payment, it will be sufficient for him to forward it by the post to some person at the latter place on the next secular day after it is received; and the person to whom it is thus forwarded will not be bound to present it for payment until the day after it has reached him by the course of the post. If payment is not thus regularly demanded, and the bank or banker should fail before the check is presented, the loss will be the loss of the holder, who will have made the check his own, and at his sole risk by his laches. But if the bank or banker continue solvent, and no damage arises from the delay in the presentment, the drawer continues liable, a check differing in this respect from a bill of exchange. If the drawer has no funds in the bank or with the banker on which or whom the check is drawn, no demand is necessary. Story Prom. Notes, sec. 493. *Himmelman v. Holating*, 40 Cal. 111; *Bell v. Alexander*, 21 Grat. 1. No protest of the check is necessary in case of its non-payment. *Bank of Mobile v. Brown*, 42 Ala. 108.

When demand of payment of a check has been made and refused, it is the duty of the holder to give notice of the dishonor of the check. But a failure in this will not discharge the drawer from liability unless damage shall result to him from the delay or failure, and then only to the extent of the damage sustained. Story Prom. Notes, sec. 492; Morse on Banks, etc., 262, 263; 3 Kent Com. 88; *Bank of Mobile v. Brown*, *supra*. Must the holder of a check, in an action against the drawer, when payment of the check has been refused, allege in his complaint that he gave notice of

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the non-payment of the check, or aver a legal excuse for not having done so? We think he must. This question arose in *Regua v. Guggenheim*, 3 Lansing, 51. The court said: "It is well settled that a drawer of a check is not liable to the holder in case of non-payment by the drawee, unless he has had notice of demand and refusal to pay. *Harker v. Anderson*, 21 Wend. 372, and cases cited. It was material, therefore, to aver notice to the defendant, or a most material element of a cause of action was wanting. Such was the rule at common law." Accordingly, upon examination, we find the averment in the approved forms of declarations on checks at common law. 2 Chitty Pl. 143, 144. We conclude that the first paragraph of the complaint was bad for the want of an averment of notice of non-payment of the check or an excuse for not giving it.

The second paragraph of the complaint alleges that Matilda Kemp was the owner of two promissory notes executed by Robert Spaugh, payable to her; that she sold the same to Griffin and delivered the same to him, for which he promised to pay her fourteen hundred and ten dollars and twenty-six cents, which he has wholly failed to do; that the notes were intended to have been sold for cash, and there had been an unreasonable delay of payment, and that the notes and purchase-money therefor belong exclusively to her; that the other defendants claim some interest in the transaction. She asks that they may be made defendants to answer as to their interest, and for judgment against Griffin for fifteen hundred dollars, etc.

It is objected to this paragraph that it shows no right of action in which David Kemp has any interest, nor does it allege that the plaintiffs are husband and wife. We think this objection to the second paragraph is well taken. A complaint or paragraph of complaint must show a cause of action in favor of all those who are joined as plaintiffs. *Lipperd v. Edwards*, 39 Ind. 165. The statute provides that husband and wife may join in all causes of action arising from

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injuries to the person or character of either and both of them, or from injuries to the property of either and both of them, or arising out of any contract in favor of either and both of them. 2 G. & H. 334, sec. 794. The first and third paragraphs show the relation of husband and wife between the plaintiffs. This one does not.

In the third paragraph of the complaint, it is alleged that the defendant Charles Griffin is indebted to said plaintiff Matilda Kemp, wife of said David Kemp, in the sum of sixteen hundred dollars for personal property sold and delivered to him, a bill of particulars of which is filed, and that the other defendants claim some interest in said property. She asks that they may be made defendants to answer as to their interest therein, and for judgment against Griffin for two thousand dollars, etc. No particular objection is urged against this paragraph. Whatever objections the other defendants might have urged against it, we think it is good as against Griffin, the only party demurring to it.

The second paragraph of the answer assumes the form of a cross complaint against Matilda Kemp and the defendants in the original complaint other than Griffin, and alleges, in substance, that the several causes of action in the paragraphs of the complaint are one and the same, and grew out of the same transaction mentioned in the first paragraph of the complaint; that at the time of drawing the check, the son and agent of the plaintiffs represented that the firm of Matilda Kemp & Co. had two notes on Spaugh, which they desired to sell; that at that time the defendant had in contemplation the purchase of an outstanding note given by said firm of Matilda Kemp & Co., hereafter more particularly described; that the notes of Spaugh, when produced, were found to be payable to Matilda Kemp, and the son and agent of said Matilda being in possession of said notes of Spaugh endorsed them in the name of said Matilda Kemp, and offered them to the defendant, but he, having in view the purchase of said outstanding paper of Matilda Kemp & Co., refused to purchase the same; that thereupon the said

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son and agent of plaintiffs represented to the defendants that it was all the same, and that said notes were the property of said Matilda Kemp & Co., and thereupon indorsed said notes in the following style, to wit, Matilda Kemp & Co., and delivered the same to him, and received the said check therefor, with full knowledge and consent of the firm to which the same was payable, viz., Matilda Kemp & Co.; that thereupon said defendant in good faith, and in full confidence of the truth of said representations of said agent, that the said note was the property of the firm of Matilda Kemp & Co., at great trouble and expense, purchased for a valuable consideration said note executed by said firm, of Matilda Kemp & Co., January 22d, 1871, for one thousand three hundred and sixty-seven dollars and fifty-three cents, payable one day after date, at the office of the Indiana Banking Company, to C. Dickson & Co., a copy of which is filed herewith; wherefore he says said Matilda Kemp is estopped to deny that the note so sold and assigned was the property of said firm of Matilda Kemp & Co., and that the check sued on was, and is, the property of said firm of Matilda Kemp & Co.; and the defendant by way of set-off says that when this action was commenced, the plaintiffs were, and now are, indebted to him in the sum of sixteen hundred dollars upon said note, which is due and unpaid, and which he offers to set off, etc.

We are of the opinion that this paragraph of the answer is good. The cause of action of the plaintiffs upon its face is in favor of Matilda Kemp & Co. They attempt by averments of mistake, etc., to make it a cause of action in favor of Matilda Kemp alone. The defendant pleads as a set-off a demand in his favor against Matilda Kemp & Co., alleging that the causes of action mentioned in the complaint are one and the same, all growing out of the purchase of the Spaugh notes and the giving of the check, and that the causes of action in the complaint are the causes of action of Matilda Kemp & Co., and not of Matilda Kemp alone. The parties interested being all before the court, we do not see any objection to setting off one demand against the other. The fact

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that David Kemp is a plaintiff can make no difference. He is a mere supernumerary—a mere nominal party—so far as he appears as a plaintiff in the first and third paragraphs of the complaint.

The demurrer to the answer was a joint demurrer to all the paragraphs except the first, assigning causes of demurrer separately, however. But it must be treated as a joint demurrer, and the rule must be applied to it, that if any one of the paragraphs was good, it should have been overruled by the court. We shall not examine the other paragraphs of the answer, as what has already been determined may enable the court and the parties to dispose of the case satisfactorily upon the new issues to be formed.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the first and second paragraphs of the complaint, and allow the parties to amend.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD
COMPANY v. IRVIN ET AL.

PRACTICE.—*Waiver of Reply.*—Where the record shows the filing of a demurrer to certain paragraphs of an answer, but does not show any ruling of the court thereon, or that any reply was filed, no question arises as to the sufficiency of the answer, and the presumption is that the defendant waived a reply.

BILL OF LADING.—*Assignment of.*—The delivery of a bill of lading transfers the title to the property. A formal assignment is not necessary.

SAME.—*Pleading—Immaterial Averments.*—In a complaint upon a bill of lading given to the consignor, which contains, in addition to the usual provisions, a clause providing that the goods shall be delivered on “presentation of duplicate hereof,” it is unnecessary to aver the reasons that influenced, and purposes that controlled, the shippers or the carrier in inserting the clause, and such averments do not add anything to the legal effect of the bill of lading.

SAME.—*Effect of Bill of Lading Containing Provision for Delivery of Goods on Presentation of Duplicate.*—A bill of lading containing a provision that the goods are to be delivered on “presentation of duplicate hereof,” establishes

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the fact that the consignor is the owner of the goods, and if the carrier delivers the goods to the consignee without the presentation of any bill of lading, the carrier becomes liable to the consignor.

SAME.—If such condition had not been in the bill of lading, the title to the goods would have vested in the consignee on their delivery to the carrier, but being there, the property remained in the consignor until the goods were paid for by the consignee.

From the Bartholomew Common Pleas.

S. Stansifer, for appellant.

R. Hill and *G. W. Richardson*, for appellees.

BUSKIRK, J.—When this case was in this court before, the judgment of the court below was reversed, because a demurrer had been sustained to the complaint. When the cause was remanded, one of the plaintiffs, Benjamin F. Jones, having disposed of his interest in the claim to Thomas and James W. Gaff, and the other plaintiff, William McEwen, having been adjudged a bankrupt, his assignees and the said Gaffs were substituted as plaintiffs, and in all other respects the complaint remains the same as it originally stood. A demurrer to the complaint was overruled, and the appellant excepted. An answer, consisting of four paragraphs, was filed; one paragraph, being in denial of the instrument sued on, was sworn to. The record shows that a demurrer was filed to the third and fourth paragraphs, but it does not show any ruling of the court thereon, nor does it show that any reply was filed. No question arises as to the sufficiency of the answer, and the presumption is that the appellant waived a reply to the answer.

The cause was submitted to the court for trial, and resulted in a finding for the appellees. New trial refused, and judgment on finding.

The sufficiency of the complaint and of the evidence to sustain the finding are the only questions presented for our decision.

The complaint is as follows: "On the 20th day of August, 1867, H. W. Comstock & Co., of the city of Indianapolis, entered into a contract with B. F. Jones & Co. for the pur-

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chase of eight hundred barrels of flour, known as B. F. Jones & Co.'s XXXX, at eleven dollars per barrel; the flour to be delivered on cars at Columbus, in Bartholomew county, Indiana, and to be paid for on receipt of the bills of lading; that under and pursuant to said contract and agreement between said parties, said B. F. Jones & Co. delivered to defendant, who is a common carrier for hire, and whose line and route extends and runs from Jeffersonville, in said State, *via* Columbus, to the city of Indianapolis, two hundred barrels of their said flour, at the said city of Columbus, which was placed on the cars of the defendant to be carried and shipped for said B. F. Jones & Co., the shippers and owners thereof, to said city of Indianapolis; that said H. W. Comstock & Co. had no interest in, or right to, said flour until the purchase-money therefor was paid; that at the time of placing said flour on defendant's cars, to be shipped as aforesaid, said firm of H. W. Comstock & Co. was wholly and notoriously insolvent; and said B. F. Jones & Co., as such owners and shippers of said flour, to retain and hold the custody and control until the purchase-money therefor should be fully paid, at the time they delivered said flour to defendant, as aforesaid, requested the station agent of said defendant, at said city of Columbus, to make and execute a bill of lading therefor, containing, among the usual clauses, that the said flour should be delivered on presentation of the duplicate; and on the delivery of said flour to defendant as aforesaid, its said agent, under and in pursuance of the request of said B. F. Jones & Co. as aforesaid, with intention to secure the control and possession of said flour in said B. F. Jones & Co. as aforesaid, until the purchase-money for said flour should be paid, made and delivered a bill of lading therefor to said B. F. Jones & Co. as the owners and shippers thereof, having the control and custody of the same as aforesaid, wherein defendant agreed to deliver the said flour without unnecessary delay, in like good order to H. W. Comstock & Co., at Indianapolis, in said State, on payment of freight, as per

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tariff of said company, and presentation of duplicate thereof, which bill of lading is as follows :

“ COLUMBUS, August 24th, 1867.

“ Received of B. F. Jones & Co., in apparent good order, except as below specified, to be transported on the J., M. & I. Railroad, the under named articles, marked as per margin, which we agree to deliver, without unnecessary delay, in like good order, to H. W. Comstock & Co., at the regular station at Indianapolis, on payment of freight as per tariff of said company, and presentation of duplicate hereof.

MARKS.	ARTICLES.	WEIGHT.
B. F. Jones & Co., _____ City Mills.	200 barrels of flour. On cars No. 3,017—672.	

“ J. R. WOODFILL.’

“ And said defendant, by its said agent, made and delivered to said B. F. Jones & Co. its second bill of lading, which its said officer marked in writing across the face of the same, ‘ duplicate,’ but which, in fact, was not a duplicate, inasmuch as the clause, ‘ and presentation of duplicate hereof,’ is left out by mistake of said agent, which will be seen by reference to said original bill of lading and said second bill of lading, marked duplicate, a copy of which is filed, marked ‘ B,’ said defendant intending by said clause, ‘ and presentation of duplicate hereof,’ in said original bill of lading, to require and bind said defendant to hold said flour until said Comstock & Co., or other person, should lawfully and properly present said duplicate bill of lading therefor, and not otherwise deliver the said flour to said Comstock & Co., or any other person ; and on said 24th day of August, 1867, before the delivery of said flour at said city of Indianapolis, said B. F. Jones & Co. made and drew their draft on said H. W. Comstock & Co., of Indianapolis, for the sum of two thousand two hundred dollars, the amount of said flour consigned as aforesaid, and on account thereof, payable at Indiana Banking Company’s Bank, at said city of Indianapolis, and immediately produced their said draft, with said intended

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duplicate bill of lading for said flour attached thereto, at the banking house of plaintiffs, who were doing a banking business as aforesaid, for the purpose of negotiating the same, who then and there, in good faith, discounted the same and paid value therefor to said B. F. Jones & Co., on the faith of said bill of lading, the plaintiffs knowing the form, character, and contents of said original bill of lading, which was then and there, as part of said transaction, endorsed and delivered by said B. F. Jones & Co. to plaintiffs, as collateral security for the payment thereof, and on the 24th day of August, 1867, said draft, with said duplicate bill of lading attached, was placed at said Indiana Banking Company's Bank, at the city of Indianapolis, for collection, who, by their agent W. W. Woolen, cashier, presented said draft with said duplicate attached, on same day, to said H. W. Comstock & Co., who, on the 24th day of August, 1867, accepted it by endorsement across the face thereof, but failed and refused to pay the same, or any part thereof; and the same was duly protested for non-payment on the 27th of August, 1867; that said H. W. Comstock & Co. were at the time of said shipment wholly insolvent, and have been continuously since, and are now wholly unable to pay said draft, or any portion thereof, and the same is wholly unpaid. Plaintiffs aver that in a reasonable time, to wit, on the 28th day of August, 1867, plaintiffs produced their said original and duplicate bills of lading for said flour at the office of defendant, at the said city of Indianapolis, and demanded said flour on the same, but defendant failed and refused to deliver the same to plaintiffs, or any part thereof; that defendant prior thereto, to wit, on the 26th of August, 1867, surrendered and delivered all of said flour to said H. W. Comstock & Co., without presentation of said duplicate or original bill of lading, or other authority, and in violation of said bill of lading, who on the same day forwarded the same beyond the limits of the State of Indiana; that said Comstock & Co. did not produce to defendant the original or duplicate bill of lading, or other authority to obtain said flour, and never had possession

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thereof; but without the production thereof, said defendant delivered and surrendered said flour to said Comstock & Co. without any authority whatever; that said Comstock & Co. were not the owners of the flour, or entitled to the possession thercof; that it was of the value of three thousand two hundred dollars. Judgment demanded for four thousand dollars, with other proper relief."

When this case was here before, it received a very full and careful consideration. See *McEwen v. The Jeffersonville, etc., R. R. Co.*, 33 Ind. 368. The only question then involved was, whether the complaint was sufficient, and it was held to be good. The complaint in the present action is the same, except a change of plaintiffs, rendered necessary by the assignment on the part of one of the original plaintiffs and the bankruptcy of the other. We are asked to overrule the former ruling of this court. We have given the subject very thoughtful consideration, and are entirely satisfied with the ruling of the court upon the clause of the bill of lading which provides for the delivery "on presentation of duplicate hereof." And in support of that ruling we refer to the following additional authorities: Angell on Carriers, sec. 324; *McEntee v. The New Jersey Steamboat Co.*, 45 N. Y. 34; *Claflin v. B. & L. R. R. Co.*, 7 Allen, 341; *Conard v. The Atlantic Ins. Co.*, 1 Pet. 446; *The Cayuga Co. National Bank v. Daniels*, 47 N. Y. 631; *Bailey v. Hudson River R. R. Co.*, 49 N. Y. 70. The three New York cases have been decided since the former decision in this cause, and fully sustain the former ruling of this court.

In the former opinion of this court, something is said in reference to the legal effect of the clause in the bill of lading providing for the payment of freight. Inasmuch as no question in reference to the payment of freight arises in the record, we do not feel called upon to express any opinion, either of approval or disapproval of that portion of the opinion.

In our opinion, the court committed no error in overruling the demurrer to the complaint.

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We next inquire whether the court erred in overruling the motion for a new trial.

In support of the motion for a new trial, and to show that the court erred in overruling it, it is insisted that there is no evidence tending to show a transfer of the bill of lading to McEwen & Jones. They had possession of it, and the draft which was drawn against it, and these facts made at least a *prima facie* case for the plaintiffs. See authorities above cited. Also, *Gibson v. Stevens*, 8 How. 384, 400. In *The Bank of Rochester v. Jones*, 4 N. Y. 505, referring to *Nathans v. Giles*, 5 Taunt. 558, it is said: "The property in a cargo for which the master of a ship has signed bills of lading, may be transferred by delivery, without endorsement of the bill of lading." See, also, *Allen v. Williams*, 12 Pick. 297.

The case in 8 How. and the cases in 47 and 49 N. Y., *supra*, fully establish the proposition that the delivery of the bill of lading transfers the title to the property. A formal assignment is not necessary. In the case in 47 N. Y., *supra*, it was held, that the delivery of a bill of lading to a bank, for the purpose of securing the payment of drafts drawn by the consignor upon the consignee, and discounted by the bank, is sufficient to transfer the title to the property covered by the bill of lading, subject to be divested by the acceptance and payment of the drafts. In our judgment, the delivery of the bill of lading to, and the payment of the draft by, McEwen & Jones vested in them the title to the flour; and it was not divested by the acceptance of the draft by Comstock & Co., they not having paid the same.

Finally, it is insisted that there was no evidence to sustain the averments of the complaint touching the reasons that influenced, and purposes that controlled, the shippers or the carrier in inserting in the bill of lading the clause, "upon presentation of the duplicate hereof."

In our opinion, such averments were unnecessary, and the appellees were not bound to prove them. They did not add anything to the legal effect of the bill of lading. The bill of

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lading fixes and determines the liability of the appellant. The agreement on her part to deliver the flour to the consignee, "upon presentation of the duplicate hereof," established the fact that the consignors were the owners of the flour; and when she delivered the flour without the presentation of any bill of lading, she became liable to the consignors, without reference to the reasons which induced the consignors to have such clause inserted. If such condition had not been in the bill of lading, the title to the flour would have vested in Comstock & Co. on the delivery to the carrier; but being there, the property remained in the consignors until the flour was paid for by the consignee.

We think there was no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.



46	187
132	457
46	187
140	370
140	437
141	558
46	187
149	689

HOPKINS ET AL. v. THE GREENSBURG, KNIGHTSTOWN, AND CLARKSBURG TURNPIKE COMPANY ET AL.

TURNPIKE.—Assessment of Omitted Lands.—Assessors appointed under the act of 1867 to make assessments for the construction of a turnpike may correct an assessment by adding or including omitted lands.

SAME.—An objection to such corrected assessment, that it is a full list of all the lands, and not of the omitted lands only, is not valid.

SAME.—Assessment Corrected After Construction of Road.—An assessment of benefits for the construction of a turnpike can be corrected and collected after the road has been completed or partly completed.

SAME.—Whether such assessment is collected to construct the road, or to pay a debt created for its construction, can make no substantial difference to those who are to pay the assessments.

SAME.—Action to Enjoin Collection of Assessment.—In an action to enjoin the collection of a turnpike assessment, it is no ground for objecting to the assessment, that the lands of persons other than the plaintiffs are incorrectly described.

SAME.—Pleading.—Departure.—In an action to enjoin the collection of assessments for the construction of a turnpike, on the ground that lands liable to

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assessment have been omitted, if an answer is filed setting up a corrected assessment, it is a departure to reply that lands of the plaintiff and other lands within the taxing limits are improperly described.

TRIAL BY JURY.—*Restraining Order or Temporary Injunction.*—In an application for a restraining order or temporary injunction, no jury trial is contemplated.

SAME.—*Perpetual Injunction.*—On the trial of an action for a perpetual injunction, where issues of fact are joined, the parties, or either of them, are entitled to a trial by jury.

EVIDENCE.—*Bill of Exceptions.*—Evidence cannot be made a part of a bill of exceptions by reference to a certain page of the record where it may be found.

MOTION FOR NEW TRIAL.—*Statements in Motion.*—Statements in a motion for a new trial cannot be taken as true, like those in a bill of exceptions.

TURNPIKE.—*Assessments.*—*Names of Owners of Lands.*—It is proper to give the names of the owners in the list of lands assessed for the construction of a turnpike, but the statute does not require it.

From the Decatur Circuit Court.

J. D. Miller, J. S. Scobey, and O. B. Scobey, for appellants.

S. A. Bonner, J. L. Bracken, B. W. Wilson, C. Ewing, and J. K. Ewing, for appellees.

DOWNEY, J.—This is the second appearance of this case in this court. Its decision when it was here before may be found in 40 Ind. 44. The object of the action was, as may be seen, to enjoin the collection of certain assessments against the lands of the appellants for the construction of the road of said company, on the ground that the assessors of benefits had failed to list all the lands within the taxing limits.

The appellee had pleaded certain facts by way of estoppel, etc., which were held sufficient in the court below, but which were held insufficient by this court.

On the return of the cause to the circuit court, the defendant, the turnpike company, pleaded by way of amended answer, in bar of the action, except as to costs, that there were no lands benefited purposely omitted by the assessors, or partiality or favor shown in the assessment; that the assessment was made by the assessors as the officers appointed by the board of commissioners, and not as the agents or

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employees of such company; and that the company in no way connived at, consented to, or procured the assessors to omit any lands, etc. It is further alleged that afterward, on the 17th day of February, 1873, the board of commissioners, upon the petition of the defendant, ordered said assessors to proceed on the 24th day of February, 1873, to view, list, and assess all lands, if any, omitted from the former assessment report; that said assessors did, on the 23d day of April, 1873, proceed to view, list, and assess all the lands at the Greensburg terminus of said road, and all other lands so omitted, and afterward, on the 23d day of April, 1873, reported the same with their affidavit thereto attached as a *nunc pro tunc* assessment as of the date of their former assessment and as a part thereof; that it will require all the resources of said company, including all of the assessments, to pay off and discharge the said indebtedness contracted in the construction of said road as aforesaid; that the auditor of said county has placed said corrected assessment on the duplicate of said county as of the date of the former; that in said subsequent assessment the omitted lands mentioned in the complaint were included, and thereby said assessment was so corrected and amended as to include a list of the lands within one and one-half miles of such road and a like distance of either end thereof; that said assessors have viewed all of such lands and assessed the benefits to each tract benefited, as shown by their report; and as to the residue of the complaint they deny each allegation thereof.

The plaintiffs demurred to the amended answer, on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was overruled.

The plaintiffs then replied as follows:

1. The general denial.
2. That the assessment mentioned in the complaint was made by Robert Armstrong, Marsh W. Baker, and Thomas Kitchen, on the 4th day of October, 1868, by filing on that day their report and affidavit with the auditor of said county;

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that said assessors were appointed under the law of 1867, to make said assessment, and for no other purpose; that on filing said report they were fully discharged from the duties of said appointment, and became from and after that time *functus officio*; that they were never called together or required to make any additional or supplemental assessment until long after the repeal of the law under which said original assessment was made, to wit, in March, 1873, when they were required to make the pretended assessment in the amended answer mentioned.

3. That the supplemental assessment mentioned in the answer was filed in 1873; that the same is not only an assessment of the lands omitted in the former assessment and report, but is a full list and assessment of all lands within one and one-half miles of said road, on either side thereof, and a like distance of either terminus; that said pretended assessors, Marsh W. Walker and Thomas Kitchen, have never been appointed by the board of commissioners of said county assessors under and pursuant to the act of the General Assembly of the State of Indiana, entitled an act authorizing the assessment of lands for plank, macadamized, and gravel road purposes, prescribing the manner of assessing and collecting the same, and repealing the law on that subject, approved March 11th, 1867, approved May 14th, 1869, but made said pretended assessment under and pursuant to their appointment under the act approved March 11th, 1867, therein repealed.

4. That the supplemental assessment is a new and complete assessment of all lands within one and one-half miles, etc.; that the same was filed in 1873; that the entire line of said turnpike road was contracted and built in the year 1869, long before the making of said assessment, in the answer set forth; and that the only object, use, or purpose of collecting such assessment is to pay off and discharge debts contracted by said company in the building and construction of said road long prior to the time of making such assessment.

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5. That the original assessment was made by filing the report of assessors on the 14th day of October, 1868; that the grading and building of said road had been contracted for prior to said time, and a large portion of said work done; that the only use and purpose of collecting said assessments, in said amended answer mentioned, is to pay the outstanding obligations of said company contracted and entered into prior to the making of said assessment.

6. That the lands of the plaintiffs in said supplemental assessment mentioned, and a large portion of the lands within one and one-half miles of said road on either side thereof, are so indefinitely and insufficiently described as that the location and description of the same cannot be determined or said land identified, the same being described by prefixing the word "of" to section, quarter, eighty, or forty-acre tracts in which said lands are situated, and giving the number of acres thereof, without other or more definite description; that the listing of one hundred acres situate within the corporate limits of the city of Greensburg is wholly insufficient and indefinite, said lots being only described by giving the number of the lots and blocks of said city and the various additions therein, without giving the name of the owner or owners of any lot or portion thereof or other more definite description.

The defendants demurred to the second, third, fourth, fifth, and sixth paragraphs of the reply, on the ground that they did not state facts sufficient to constitute a reply, and the demurrer was sustained to all the paragraphs. This left no reply but the general denial, and as the record before us shows, no answer but the amended answer.

The plaintiffs demanded a trial by jury, which was denied by the court. A trial by the court resulted in a finding for the defendants.

A motion for a new trial was made by the plaintiffs, which was overruled by the court, and there was final judgment for the defendants.

The errors assigned in this court are as follows:

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1. Overruling the plaintiffs' demurrer to the amended answer.
2. Sustaining the demurrer to the second, third, fourth, fifth, and sixth paragraphs of the reply.
3. Overruling the plaintiffs' motion for a new trial.

The ruling of the court on the demurrer to the amended answer was in accordance with the law as decided by this court in the case of *The Sand Creek Turnpike Co. v. Robbins*, 41 Ind. 79.

The second and third paragraphs of the complaint present the same question as that relating to the amended answer. The ground is assumed that the assessors, who were appointed and made the assessments under the act of 1867, could not correct the assessment by adding or including the omitted land. It was decided in the case to which we have referred that they could do so. The objection that the corrected assessment is a full list of all the lands, and not of the omitted lands only, is no valid objection. If it was shown that any change had been made in the assessment of the lands previously assessed, in the amount, or in any other material respect, the question would demand attention. But this is not alleged. We presume from the absence of such allegation that no such change was made, and that the assessors merely recopied that part of the original assessment, and added to it the omitted lands.

The fourth and fifth paragraphs of the reply raise the question whether the assessment can be corrected and collected after the road has been completed, or partially completed, for the purpose of raising means to discharge debts incurred for the building or completion of the road. The company might borrow money to complete and extend its road. 1 G. & H. 479, sec. 21. It had power and authority to issue bonds and other evidences of debt for the purpose of raising money for such purposes. 1 G. & H. 479, sec. 22. If the company thought fit to anticipate the collection of the assessment by borrowing money or incurring debts for the construction of its road, we find nothing in the stat-

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utes on the subject prohibiting them from so doing. It might be greatly to the advantage of the company and those in need of the road and entitled to use it, to construct the road at once, trusting to the subsequent collection of the assessment for the means to enable them to pay off the debt incurred for that purpose. Whether the assessment is collected to construct the road or to pay a debt created for its construction, can make no substantial difference to those who are to pay the assessments.

The objection to the assessment mentioned and relied upon in the sixth paragraph of the reply is, that the lands of the plaintiffs and other lands within the taxing limits are imperfectly described. This objection is not urged in the complaint. So far as it relates to defects in the description of the lands of persons other than the plaintiffs, it seems to us that it can not be allowed. If they do not raise the question, but pay the amount assessed, it is not for the plaintiffs to raise the objection for them. Although the sixth paragraph of the reply speaks of the lands of the plaintiffs in the supplemental assessment, it must be understood that these are the lands of the plaintiffs mentioned in the complaint, and which are in the original assessment list as well as in the corrected list. This objection to the assessment, having been apparent in the original as well as in the corrected assessment, should have been made in the complaint, if the plaintiffs intended to rely upon it. It is an objection which, if it existed at all, existed when the complaint was filed. The complaint opposed the collection of the assessments on the ground that part of the lands within the taxing limits had been omitted from the list. The reply abandons the ground on which the case was put in the complaint, and attempts to put it on a new ground. This is a departure in pleading, and cannot be allowed. Whether the departure be in point of fact or of law, it is equally fatal to the reply, and the objection to the pleading is properly presented or taken by demurrer. *McAroy v. Wright*, 25 Ind. 22. For these reasons, we

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think there was no error in sustaining the demurrer to the sixth paragraph of the reply.

It is insisted that the court erred in refusing a trial by jury on the motion of the plaintiffs. Counsel for appellees justify the ruling of the court on the ground that this was an application for an injunction, and that such applications are to be decided by the court without a jury. They say they think it has been almost uniformly understood by the profession, and by the courts of the State, that, in applications for injunctions, a jury trial is not contemplated by our statute. They refer us to cases decided in New York, under the code of that state, as authority. But upon an examination of the code of that state, we find it so different from ours on this subject, that no case decided by the courts of that state could be any authority here. Our present constitution provides, that, "in all civil cases, the right of trial by jury shall remain inviolate." Art. I, sec. 20. This clause, it has been held, secures the right to a trial by jury in all civil cases which were regarded as such when the constitution was adopted. *The Lake Erie, etc., R. R. Co. v. Heath*, 9 Ind. 558. But it has been held that the legislature may extend that mode of trial to cases which were not, at the adoption of the constitution, regarded as civil cases, although they cannot take it away from cases contemplated by that clause of the constitution. *The Lake Erie, etc., Railroad Co. v. Heath, supra*. There can be no doubt but that the legislature has extended the trial by jury to cases in which it was not used before the enactment of the code. Then it was not used in chancery cases, except at the option of the chancellor. Now it is provided, that "issues of fact must be tried by a jury, unless a jury trial is waived." 2 G. & H. 196, sec. 320. If there is an issue of fact to be tried, whether the action be one which would formerly have been at law or in equity, the trial must be by jury, unless a jury be waived. In our opinion, the issue formed by the traverse of the amended answer in this case was an issue of fact, and should therefore have been tried by a jury, unless a trial

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by jury was waived. No waiver of the right to a jury appears. On the contrary, a demand for a trial by jury was made at the proper time, the ruling of the court in refusing it was made a ground of the motion for a new trial, and the refusal to grant the new trial is assigned as error. Counsel for the appellant are no doubt so far correct in their position that upon an application for a restraining order or a temporary injunction, no jury trial is contemplated. There is in such cases, properly, no issue to be tried, and granting or refusing the restraining order or injunction is a matter for the court or judge to decide. But this cannot be the rule in cases where a perpetual injunction is the remedy sought, as in this case. We conclude that the court erred in denying a trial of the issue by a jury.

The next question relates to the disqualification of Kitchen, one of the assessors of benefits, who acted in the making of the original as well as the supplemental assessment, in consequence of being an owner of property which was within the taxing limits. Assuming that this question could be raised under the general denial, without replying the same, still we think it is not in the record. The bill of exceptions says:

“Thomas Kitchen, a competent witness, being upon the witness stand, the plaintiff proposed to prove by the said Kitchen the following facts, to wit.”

The facts which it was proposed to prove are not stated, but the clerk says, “see page 41 of this record.” Page 41 we find to be occupied by a part of the motion for a new trial. The motion for a new trial is properly part of the record, but its statements cannot supply the facts which should appear in the bill of exceptions. Its statements can not be taken as true, like those of the bill of exceptions. The motion is the language of counsel, while the bill of exceptions is the language of the court. The bill of exceptions imports the truth, while the statements in the motion must be shown to be true by some appropriate evidence. We cannot regard this objection as shown by the record.

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The last point made is, that the supplemental assessment is invalid, because the description of some of the tracts of land is indefinite, and in some cases the name of the owner is not given. Upon examination of the list, we find a few tracts of land which are probably not well described, and in most of the assessments of lots in Greensburg the name of the owner is omitted. Nothing is assessed against these lots.

As we have already stated, we think these appellants cannot sustain their action by showing a defect in the description of lands of other parties. These other parties may not make the objection, but may pay the assessments against their lands. The appellants cannot object for them. Several tracts are described thus: "Of n. e. $\frac{1}{4}$ 35, 11, 10, 40," with the words at the head of the columns to denote section, township, range, and acres. This may not be an indefinite description, if the line running parallel with the turnpike, one and a half miles from it, is taken as one of the boundaries. The description would then indicate that the forty acres were so much of the quarter section as lies within the prescribed limit. While we regard it as highly proper to name the owner of the property in the list, we do not find any thing in either the law of 1867 or that of 1869 which requires it. The first named statute says the assessors shall "make a list of all the lands within such bounds, and assess the amount of benefit that will result from the proper construction and maintenance of such proposed road. Acts 1867, p. 167, sec. 2. That of 1869 says they shall "make a list of said lands and assess the amount of benefit that will result to each tract from the proper construction," etc., "and report," etc., "in writing, and append thereto their affidavit," etc. Acts 1869, p. 74, sec. 3.

It may be well to remark in this connection, that in the case of *The Sand Creek Turnpike Co. v. Robbins, supra*, while an additional or amended assessment was sustained, which had been made by the assessors first appointed under the act of 1867, it was not decided that the omitted lands could

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not be listed and assessed by other appraisers appointed under the act of 1869, nor was it decided that the additional assessment related back to the time when the original assessment was made.

The judgment is reversed, with costs; and the cause is remanded, with instructions to grant a new trial.

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46	197
142	68
46	197
144	490
146	276

PRACTICE.—Motion to Strike Out.—Questions arising upon a motion to strike out a part of a pleading must be presented by a bill of exceptions.

BILL OF EXCEPTIONS.—It must appear that a bill of exceptions was filed within the proper time, or it cannot be regarded as in the record.

WILL.—Contest of.—Demurrer.—Assuming, without deciding, that a party may demur to one or more of the several grounds of contest of a will, if a demurrer be joint, and any one of the grounds be good, the demurrer should be overruled.

SAME.—Unsound Mind.—That a testator was of unsound mind at the time of making his will, is a good ground of contest.

BILL OF EXCEPTIONS.—Evidence.—Where evidence is copied into the record without any indication to distinguish it from ordinary entries of the clerk, it cannot be regarded as legally in a bill of exceptions.

INSTRUCTIONS.—Instructions Given Made Part of Record.—Instructions given by the court cannot be made a part of the record, or any question thereon be presented, by merely indorsing thereon, "given and excepted to," signed by the attorneys, when such instructions are not also signed by the judge.

SAME.—Instructions Refused Made Part of Record.—When instructions asked are signed by the party or his attorney, refused by the court, and noted as refused and excepted to, signed by the party or his attorney, they become a part of the record, without the signature of the judge.

From the Morgan Common Pleas.

G. M. Overstreet, A. B. Hunter, W. R. Harrison, and W. S. Shirley, for appellants.

S. Claypool, C. F. McNutt, G. W. Grubbs, and F. P. A. Phelps, for appellees.

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DOWNEY, C. J.—This was a proceeding by the appellees, part of the heirs of Daniel Etter, deceased, against the appellants, the widow and other heirs and devisees of said deceased, instituted to set aside the will of said deceased. The causes alleged why the will should be set aside are:

- 1st. That the testator was of unsound mind.
- 2d. That the pretended will was unduly executed, in this, that at the time when it was made the testator was under the improper restraint and influence of the defendants and certain of the defendants, and that the said will was made in pursuance of the desire of the defendants and certain of them, and not in pursuance of any desire or judgment of the testator.
3. That the execution of said will was procured through the deceit, falsehood, and wrong of certain of the defendants and others.
- 4th. That the making of the will was procured by the undue and improper influence and conduct of certain of the defendants, in this, that they instigated the testator against the plaintiffs, and thereby fraudulently induced him to make the will contrary to his wishes.
5. That the making of the will was procured by the undue influence and improper conduct of certain of the defendants, to wit, Levi Etter and Ephraim Etter, in this, that they falsely and fraudulently, and by making false and fraudulent statements to the testator concerning the said defendant [plaintiff] Daniel and others of the plaintiffs, prejudiced the mind of the said testator, who was then so feeble in body and weak in mind, against the said Daniel and others of the plaintiffs, and that while said testator was under the prejudice and passion so induced by them, they procured him to execute said will, contrary to any deliberate purpose or wish of said testator, thereby in manner aforesaid, by reason of the influence aforesaid, he unequally, unjustly, and wrongfully, divided and apportioned his said estate as when dying he declared.
6. That after the execution of said will, the testator revoked

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the same by the sale and conveyance of certain of the lands therein described, amounting to five thousand dollars in value.

A motion was made by the defendants to strike out certain portions of the complaint, which the court overruled, except as to the cause numbered six, relating to the revocation of the will, which part the court struck out. The defendants then demurred jointly to the first, second, third, and fourth causes of contest, on the ground that the same, nor either of them, stated facts sufficient to constitute a valid cause of action or contest. This demurrer was overruled, and the defendants excepted. The defendants then answered by filing a general denial, and there was an agreement that the parties might give in evidence all matters of defence or reply under the issue thus formed.

The issue was tried by a jury, and there was a verdict for the plaintiffs. A motion by the defendants for a new trial was overruled, the defendants excepted, and were given sixty days in which to file their bill of exceptions. Final judgment was rendered for the plaintiffs, setting aside the will and the probate thereof.

The errors properly assigned are the following: 1. Overruling the motion to strike out parts of the complaint. 2. Overruling the demurrer to the complaint. 3. Refusing to grant a new trial.

There are several other assignments of error, but they are such as should be embraced in the third, being reasons for which a new trial might have been granted, if they are at all available.

When the motion to strike out part of the complaint was overruled, the clerk's entry says the defendants excepted. This was at the October term, 1871, and on the third day of the term. No time was then given in which to file a bill of exceptions. A bill of exceptions is found in a subsequent part of the record, without anything to show when it was filed, or that it was ever filed, except that it is found in the record. "The party objecting to the decision must except at the time the decision is made, but time may be given to

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reduce the exception to writing," etc. 2 G. & H. 229, sec. 343. We can not regard this bill of exceptions as properly in the record. The question is not presented without a bill of exceptions.

The demurrer to the complaint, as we have already said, was a joint demurrer to the first, second, third, and fourth causes assigned for contesting the will. Assuming, without deciding, that a party in such a case may demur to one or more of the grounds of contest, where there are several of them, still this is not such a demurrer. But as the demurrer is to the four specifications, if any one or more of them be good, the demurrer was properly overruled. Without further examination, we think there can be no question that the first ground of contest, that is, that the testator was of unsound mind, was sufficient. It follows that the court did not err in overruling the demurrer.

The reasons alleged why a new trial should have been granted are the following, viz.: 1st. The verdict is not sustained by sufficient evidence. 2d. It is contrary to law. 3d. Admitting evidence to go to the jury over the objection of the defendants, to which the defendants excepted at the time, because inadmissible, irrelevant, and improper, and as shown by exceptions. 4th. Refusing to admit evidence to the jury offered by the defendants on objections of the plaintiffs, to which the defendants excepted, as shown by exceptions. 5th. The court misdirected the jury in matters of law in the final instructions to the jury, as shown by exceptions of defendants thereto. 6th. Refusing to instruct the jury as asked by the defendants, as shown by exceptions. 7th. Refusing to strike out parts of plaintiffs' complaint. 8th. Overruling the defendants' demurrer to the complaint.

If there is a bill of exceptions in the record containing the evidence given on the trial, we can not see what part of the record it embraces and what it does not embrace. There is no formal or any other commencement to it that we can discover. The evidence which is in the record gets in in this form: On the 30th day of January, 1872, being the 18th day

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of the term, this entry is made by the clerk: "Come again the parties by their attorneys aforesaid, and the jury aforesaid also comes, and the hearing of this cause being resumed, and the evidence being heard, the jury, under the instructions of the court, are permitted to separate until eight o'clock to-morrow morning. The plaintiffs gave to sustain issues in their behalf the following evidence." Then follows the evidence which is copied into the record, without any indication that this is the commencement of a bill of exceptions, or anything to distinguish it from the ordinary entries of the clerk. This entry is on page 13 of the transcript. On page 79, it is stated "and this was all the evidence in the case," and then follow the signature and seal of the judge. We can not regard this as a proper, sufficient, or legal bill of exceptions. *The Columbus, etc., Railway Co. v. Griffin*, 45 Ind. 369. When the motion for a new trial was overruled, which was on the 17th day of the term, sixty days were given in which to prepare, tender, and file the bill of exceptions. It appears to have been signed by the judge on the 3d day of February, 1872, but when it was filed is not shown by the transcript. The bill of exceptions attempting to reserve the questions regarding the improper admission and rejection of evidence, was signed by the judge, as appears at the bottom thereof, on the 2d day of February, 1872. But the date when it was filed does not appear. We have several times decided that, under the circumstances stated, the bill of exceptions can not be regarded as in the record. The rule is generally expressed by saying that when time is given beyond the term in which to file a bill of exceptions, the record must show that it was filed within the time. We think, under this rule, we can not hold that either of these bills of exception is properly in the record, or any part of them. It follows, therefore, that the first, second, third, and fourth reasons for a new trial cannot be considered.

The fifth reason relates to the instructions given by the court. These instructions occupy twenty-one pages in the transcript. They are not embraced in any bill of excep-

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tions, nor are they signed by the judge. On several of the pages are written the words "given and excepted to," signed by the attorneys of the defendants. The statute expressly requires that "all instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." 2 G. & H. 198, sec. 324. It was with a view to this requirement, no doubt, that it was provided by sec. 325, on the same page, that an exception might be taken to charges given by writing at the close of each instruction the words "given and excepted to," the party or his attorney signing the same. The requirement that the instructions given by the court shall be signed, if complied with, identifies the instructions as those actually given by the court. The other mode of saving an exception to instructions given, which is by a bill of exceptions, was formerly the only mode. In that mode the instructions are identified by being in the bill of exceptions which is signed by the judge. In the new mode allowed by the code of practice, the signature of the judge to the instructions serves to identify them, as the signature to the bill of exceptions serves to identify them when they are set out in it. We think the instructions copied into the transcript as those which were given by the court, for the reason that they are not signed by the judge, cannot be regarded as properly in the record, or as presenting any question for our decision. *Hersleb v. Moss*, 28 Ind. 354; *Wingate v. McNamar*, 28 Ind. 481; *Newby v. Warren*, 24 Ind. 161; *Allen v. Davison*, 16 Ind. 416; *The Jeffersonville, etc., R. R. Co. v. Cox*, 37 Ind. 325.

The instructions asked and refused stand on a different ground. According to the case of *The Jeffersonville, etc., Railroad Co. v. Cox, supra*, it is not necessary that instructions asked and refused shall be authenticated by the signature of the judge. But when they are signed by the party or his attorney, refused by the court, and noted as "refused and excepted to," signed by the party or his attorney, they become a part of the record without the signature of the judge. The instructions asked by the defend-

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ants in this case are signed by the attorneys of the defendants, and some of them have on the margin the words "refused and excepted to," and the signature of the attorneys for the defendants. There are also words written on the margin of some of them to the effect that they were "refused because given in substance in other charges," but these memoranda are not signed by any one. Perhaps we can give no effect to such memoranda on this account. We are at liberty to presume, however, that the instructions asked were not applicable to the facts of the case, as disclosed by the evidence, as that is not in the record, and that they were refused for that reason, or that they were refused for any other reason, which under any supposable state of the case rendered their refusal proper; for we are to presume that the court did right in refusing the instructions, and the party complaining of the action of the court must show the existence of the error, of which they complain. Governed by this rule, we can not say that there was any error in refusing the instructions. *The Columbus, etc., Railway Co. v. Powell*, 40 Ind. 37, and cases cited; and *The Jeffersonville, etc., R. R. Co. v. Cox*, 37 Ind. 325.

The judgment is affirmed, with costs.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

SCOTT ET AL. V. THE STATE, EX REL. ROBERTS ET UX.

OFFICE AND OFFICER.—*Official Bond.*—*Surety.*—*County Clerk.*—*Guardian and Ward.*—As it is not a duty imposed by statute upon a county clerk to receive money belonging to a ward from a guardian, the sureties on the official bond of the clerk are not liable for such money received by the clerk, though received pursuant to an order of the court of common pleas directing the guardian, upon resigning his trust, to deposit with the clerk the balance in his hands due to his ward.

Scott *et al. v. The State, ex rel. Roberts et ux.*

From the Crawford Common Pleas.

H. Woodberry, W. H. Peckinpaugh, L. Q. DeBruler, and C. A. DeBruler, for appellants.

S. K. Wolfe, for appellees.

BUSKIRK, J.—This was an action upon the official bond of James M. Lemonds, clerk of Crawford county. The action was commenced against Lemonds and the appellants, and there being a return of not found as to Lemonds, the action was as to him dismissed.

The appellants demurred to the complaint for the want of sufficient facts. The demurrer was overruled, and they refusing to plead further, final judgment was rendered for the appellees.

The only error assigned is based upon the action of the court in overruling the demurrer to the complaint.

The complaint alleged, in substance, the election of Lemonds and the execution of his official bond; that Allen T. Fleming was the guardian of the relatrix, Lucinda; that on the 24th day of May, 1865, the said guardian submitted his report and resigned his trust, and under and in pursuance of an order then made by the common pleas court, he paid to the said Lemonds as such clerk, the sum of one hundred and sixty-eight dollars and sixty-five cents, the amount then due to his said ward; that the said Lemonds received said money in obedience to such order; that the said Lemonds never accounted for said money, but vacated his office, fled from the State, and converted the same to his own use. There is no formal objection urged to the complaint. The only question argued by counsel is, whether the appellants, as the sureties of Lemonds, are liable for the money paid to him by said guardian, under the order of the court. It is conceded by counsel for appellees that there is no statute law of the State which authorized the guardian to pay the money belonging to his ward to the clerk, or which made it the duty of the clerk to receive it, but that the court of common pleas possessed full chancery powers, and

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had full power and authority to make the order requiring the guardian to pay and the clerk to receive such money, and that such order had the force and effect of a statute making the clerk the custodian of said money.

It is, on the other hand, contended by counsel for appellants, that the contract of the sureties of Lemonds is *strictissimi juris*; that their liability is not to be extended by implication beyond the terms of the original obligation; that when they signed the bond of the clerk, they agreed to be responsible for the faithful discharge of his official duties—that is to say, that they would be responsible for the faithful discharge of such duties as were then or might thereafter be imposed upon him by the legislature; that this was the exact limit and measure of their responsibility; that as no law of the State imposed upon Lemonds the duty, as clerk, of receiving this money from the guardian, he did not become liable officially to pay it over to the person entitled to receive it, and that the appellants cannot be made to respond in the character of sureties, in damages, for his failure so to do, and that the court possessed no power, by its order, to extend the liability of the sureties by imposing upon the clerk a duty not imposed by law.

The precise question involved here was decided by this court in *Jenkins v. Lemonds*, 29 Ind. 294. That was an action upon the official bond of the same clerk for a failure to pay over money paid to him by an administrator under the order of the court. This court say: "The liability of the sureties upon the bond is not to be extended by implication beyond the terms of the contract. *The United States v. Boyd*, 15 Peters, 187; *Miller v. Stewart*, 9 Wheat. 680. They were only liable for the failure of the clerk to discharge his official duties. It was not his duty, nor could he, as clerk, receive the money belonging to an estate from the hands of an administrator." See *Smith v. United States*, 2 Wallace, 219; *Crews v. Ross*, 44 Ind. 481.

The question involved here was recently decided adversely

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to the liability of the sureties, in the case of *The State, ex rel. Arnold, v. Givan*, 45 Ind. 267.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint.

THE STATE, EX REL. ROBERTS ET UX., *v.* FLEMING ET AL.

GUARDIAN AND WARD.—*Surety.*—*County Clerk.*—The statute not having made it one of the duties of the county clerk to receive money due a ward from a guardian, upon the settlement of the guardianship, though deposited with the clerk by order of the court, the guardian and the surety on his bond are liable to the ward, if the clerk converts to his own use money so deposited.

From the Crawford Common Pleas.

S. K. Wolfe, for appellants.

W. N. Tracewell and *E. M. Tracewell*, for appellees.

BUSKIRK, J.—This was an action upon a guardian's bond. The complaint shows that the appellee Fleming was the guardian of the relatrix, Lucinda Roberts; that as such guardian he filed the bond in suit with Cole as his surety; that said guardian has in his hands the sum of five hundred dollars belonging to his ward; that his ward was married in 1869, and arrived at full age of twenty-one years before the commencement of the action; that said guardian has never accounted; that on the 24th day of May, 1865, said guardian resigned his trust and wrongfully and without authority of law, and in violation of his duty, deposited said money with one James M. Lemonds, clerk, who had no authority to receive the same, and who has failed to pay the same to the relatrix.

The cause was tried by the court upon an agreed statement of facts, and resulted in a finding for the appellee.

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The agreed statement of facts is in the record by a bill of exceptions and fully sustains the material averments of facts in the complaint, leaving the simple question of law to be decided by the court, as follows:

"It is further agreed by the parties that if said order of the court and the payment and deposit by said guardian under it are valid and sufficient to discharge said guardian from liability on said bond, then the finding of the court and judgment shall be for the defendants, otherwise, to be for the plaintiff; the amount shall be the amount so paid to and deposited with the said clerk and six per cent. interest on the same to date, and ten per cent. damages on said principal and interest."

This action was brought to recover from the guardian the same money for which the action in the name of the State, on the relation of the same parties, against Scott and Archibald (*ant*, p. 203,) was brought. In that case, we held that the sureties of the clerk were not responsible for the money paid by Fleming, the guardian, to such clerk, under the order of the court. It necessarily results that the guardian is responsible for such money. This is a very great hardship upon the guardian, who acted in good faith and with the best of motives. The responsibility does not rest with the courts, but the legislature, whose attention has time and again been called to the question and the necessity for legislation urged upon their consideration, but it has all been in vain.

The amount paid by the guardian to the clerk on the 24th day of May, 1865, as shown by the agreement, was one hundred and sixty-eight dollars and sixty-five cents. The plaintiff is entitled to recover that sum with six per cent. interest and ten per cent. damages. There is no necessity for a new trial, the facts all being agreed upon.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to render a judgment for the plaintiff for one hundred and sixty-eight

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dollars and sixty-five cents, with six per cent. interest from the 24th day of May, 1865, with ten per cent. damages on the aggregate of principal and interest.

GORDON ET AL. *v.* SWIFT.

PLEADING.—*Representations.—Warranty.*—If property be sold to several persons under representation and warranty that it is of a certain quality and value, and a part only of the purchasers give a note for the price of the property, the latter, when sued upon the note, may set up, by way of answer, that the property for which the note was given was not of the quality or value represented and warranted.

SAME.—*Set-Off.—Mutuality.*—Two of three defendants in an action on a promissory note pleaded a set-off.

Held, that the answer was bad.

From the Floyd Circuit Court.

G. V. Hawk and *W. W. Tuley*, for appellants.

D. C. Anthony, for appellee.

PETTIT, J.—The appellee, Alexander Swift, brought this suit against the appellants, John Gordon, Sr., John Gordon, Jr., Helen L. Gordon, and Joseph J. Terstegge, on a note given by the three Gordons to the appellee, Swift, and to foreclose a mortgage given to secure the same by John Gordon, Jr., and Helen L. Gordon. Terstegge was made a party because he had purchased the real estate mortgaged after the mortgage was made and recorded.

All the defendants joined in two paragraphs of the answer, setting up a partial failure of the consideration of the note and mortgage, and the substance of these paragraphs is, that the note and mortgage were given to secure the payment of certain personal property sold and delivered by Swift to a firm of Gordons & Martin (of which John Gordon, Sr., and John Gordon, Jr., were members), and that Swift agreed,

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promised, represented, and warranted that the property so sold to the firm of Gordons & Martin was of a certain quality and value, when in fact it was not of such quality and value, but of greatly less quality and value, and averring a partial failure of the consideration of the note and mortgage, and asking a deduction accordingly.

To each of these paragraphs a demurrer for want of sufficient facts was sustained.

We hold that this ruling was error, for which the judgment must be reversed. 2 G. & H. 106, sec. 81.

If property is sold to four persons under representations and warranty that it is of a certain quality and value, and two of the four give a note for the property, when sued on the note, the two giving it may set up, by way of answer, that the property for which it was given was not of the quality and value represented and warranted. See *Ball v. The Citizens' National Bank*, 39 Ind. 364.

The third paragraph of the answer is by John Gordon, Sr., and John Gordon, Jr., alone, and sets up substantially the same facts as the first and second paragraphs of the answer and many other facts and averments, and claims a set-off against the note and mortgage.

A demurrer for want of sufficient facts was sustained to this paragraph of the answer. There was no error in this ruling. The set-off was not mutual, or between the parties to the suit. 2 G. & H. 88, sec. 57; *Johnson v. Kent*, 9 Ind. 252; *Blankenship v. Rogers*, 10 Ind. 333; *Knour v. Dick*, 14 Ind. 20.

A set-off and want or failure of consideration are different questions.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to overrule the demurrs to the first and second paragraphs of the answer.

Petition for a rehearing overruled.

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45 125 400
CRIMINAL LAW.—Circuit Court.—Criminal Causes Commenced by Affidavit and Information.—Section 79 of the act abolishing courts of common pleas, etc., Acts 1873, p. 87, does not confer upon the circuit court the power to hear and determine a criminal cause commenced in that court by affidavit and information.

From the Randolph Circuit Court.

J. C. Denny, Attorney General, and *J. W. Ryan*, Prosecuting Attorney, for the State.

J. N. Templer and *R. S. Gregory*, for appellee.

DOWNEY, J.—This was a prosecution against the appellee, in the circuit court of Delaware county, for burglary, commenced by affidavit and information. It is alleged in the information, in addition to the allegations charging the crime in the usual form, that the defendant was then in the custody of the sheriff of Delaware county, Indiana, on a charge of the aforesaid felony, for which and of which he had not been prior thereto indicted by any grand jury of that county. The venue was changed to the circuit court of Randolph county. On motion of the defendant, the affidavit and information were quashed, and the State excepted. This ruling of the court is assigned as error.

By the act of March 5th, 1859, Acts 1859, p. 94, it was provided, that the common pleas should have original jurisdiction of felonies not punishable with death, concurrent with the circuit court, in certain cases. One of which cases was: "When a person is in custody on a charge of felony before indictment by the grand jury."

The act of March 6th, 1873, to divide the State into circuits, etc., abolishing the courts of common pleas, and transferring the business thereof to the circuit courts, etc., Acts 1873, p. 96, sec. 79, provides, that "such circuit courts, in addition to the jurisdiction heretofore exercised by them, shall also have the same jurisdiction that has heretofore been exercised by the court of common pleas, and all laws and parts of laws concerning said courts of common pleas, shall be

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hereafter construed to mean and apply to said circuit courts, so far as the same may be applicable, and the offices of common pleas judge and district attorney are hereby abolished."

The position assumed by counsel for the State is, that under these statutes prosecutions for felony in the circuit court may, under the circumstances disclosed in this case, be by affidavit and information.

We are of the opinion that there was no error in quashing the affidavit and information. No doubt the main object of section 79, above set forth, was to confer upon the circuit court jurisdiction of those causes and matters of which the common pleas had jurisdiction, and of which the circuit court had no jurisdiction, such as the settlement of decedents' estates, guardianships, etc. The circuit court already had jurisdiction of felonies, and no act was necessary to transfer or confer the same. The section, in order to accomplish what is contended for by the State, must not only transfer to the circuit court the jurisdiction, but must also introduce in the circuit court the mode of proceeding in such cases, which prevailed in the common pleas, that is, by affidavit and information. This the statute does not attempt to do.

If a party in custody, before indictment, can be tried in the circuit court on an affidavit and information, it would be almost, if not entirely, at the pleasure of the prosecuting attorney, whether he would in any such case allow the matter to go before the grand jury or not.

We are of the opinion that the act of 1859, conferring a limited jurisdiction upon the common pleas in prosecutions for felony upon affidavit and information, cannot and does not confer upon the circuit court the power to try cases of felony in that way.

The judgment is affirmed.

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46	219
130	576
46	219
143	373

PRINCIPAL AND AGENT.—*Demand.*—In a complaint by a principal against his agent to recover money collected by the latter and not paid over, it is essential to aver a demand of payment before suit.

SAME.—*Arrest of Judgment.*—When, in a suit by the principal against his agent for not paying over money collected, the complaint fails to allege a demand before suit, and there is a verdict for the plaintiff, judgment should be arrested.

AMENDMENT.—*After Verdict.*—A bad complaint cannot be made good by an amendment after verdict. Such amendment is not properly a part of the record.

From the Cass Circuit Court.

H. C. Thornton, for appellant.

BUSKIRK, J.—This was an action by the appellee against the appellant, to recover for certain moneys by him collected as the agent of the appellee.

There was issue, trial by jury, and a general verdict in favor of the appellee. The jury, in answer to a special interrogatory, found that the appellee had made a demand of the appellant for said sums of money before the commencement of the action. The court overruled motions for a new trial and in arrest of judgment, and the errors assigned are based on these rulings.

Having reached the conclusion that the court erred in overruling the motion in arrest of judgment, we shall not pass upon the motion for a new trial.

The complaint alleged that the appellant, as the agent of the appellee, had collected certain sums of money, which had not been paid over, but there was no averment of any demand for the payment of such moneys. This omission made the complaint defective. In *Armstrong v. Smith*, 3 Blackf. 251, this court said: "This appears to us to be a plain case. The declaration shows that the defendant collected the money, for which the suit was brought, as the agent of the plaintiff. To entitle a party, under such circumstances, to recover, he should aver and prove a demand of the money previously to

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the commencement of the suit. It would be unjust, and contrary to the implied contract between the parties, in cases like the present, to subject the agent to a suit for the money collected by him for his principal, without a previous demand."

The ruling in the above case has been followed in the following cases: *Judah v. Dyott*, 3 Blackf. 324; *Hannum v. Curtis*, 13 Ind. 206; *English v. Devarro*, 5 Blackf. 588; *Jones v. Gregg*, 17 Ind. 84; *Black v. Hersch*, 18 Ind. 342; *Catterlin v. Somerville*, 22 Ind. 482; *Bougher v. Scobey*, 23 Ind. 583; *Underwood v. Tatham*, 1 Ind. 276; *Conner v. Comstock*, 17 Ind. 90; *Nutzenholster v. The State, ex rel. Sumner*, 37 Ind. 457.

It appears from a bill of exceptions that some twenty days after the verdict of the jury had been returned, and while the motion for a new trial was pending, the appellee asked and obtained leave of the court to amend the complaint, and that it was amended by averring a demand before the commencement of the action. The court possessed no power to permit such an amendment to be made after the trial. The question was fully considered, and the authorities reviewed, in the case of *Maxwell v. Day*, 45 Ind. 509. We cannot regard the amendment as constituting a part of the complaint. Without an averment of demand, the complaint was fatally defective, and the motion in arrest of judgment should have been sustained.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to arrest the judgment.

HAMILTON *v.* ELLINS.

NEW TRIAL.—Neither a ruling on a demurrer to a pleading nor a ruling on a motion to strike out such pleading can be a ground for a new trial.

SAME.—*Instructions.*—If in any case it would be an available error that the court did not fully instruct the jury when not requested to do so, that point does not arise where the record fails to show that the court did not fully instruct them.

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From the Morgan Common Pleas.

C. F. McNutt and G. W. Grubbs, for appellant.

W. R. Harrison and W. S. Shirley, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellant for the recovery of the price and value of certain goods, wares, and merchandise sold and delivered, a bill of particulars of which was filed with the complaint.

The defendant answered: 1st. A general denial. 2d. Payment. 3d. Payment of a part of the amount in different sums and at different times, and the execution of a note for the residue, which, it is alleged, the plaintiff accepted in full discharge of the same; that he afterward paid off said note, except as to one hundred and twenty-three dollars, for which he gave the plaintiff his note, on which the plaintiff obtained judgment, which he now holds; wherefore, etc. Reply in denial of the second and third paragraphs of the answer. The cause was tried by a jury, and there was a verdict for the plaintiff. A motion by the defendant for a new trial was overruled, and final judgment was rendered on the verdict. The overruling of the motion for a new trial is the only error properly assigned.

The first reason for a new trial was, that the verdict was contrary to law, and the second was, that it was contrary to the evidence. These reasons for a new trial are not seriously urged here. The third reason was the refusal of the court to strike out the third paragraph of the reply, and the fourth was overruling the defendant's demurrer to the third paragraph of the reply. These are not reasons for a new trial, and the record fails to show any such action of the court. The fifth reason is the refusal of the court to instruct the jury, as shown by bill of exceptions. There is no ground for this objection in the record. No bill of exceptions shows any refusal of the court to give any instructions. The sixth reason is, that the court erred in failing to instruct the jury as to the whole law of the case; and the seventh is, that the court, in instructing the jury, omitted and failed to instruct them as to the legal effect of the notes given in evi-

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dence. There is an instruction in the record, but not in any bill of exceptions, and it does not appear whether it was the only instruction given or not. If, in any case, it would be an available error that the court did not fully instruct the jury, when not requested to do so, that point does not arise upon this record, because it does not appear that the court did not fully instruct them. There is really no question which we can decide.

The judgment is affirmed, with costs and five per cent. damages.

THE OHIO AND MISSISSIPPI RAILWAY CO. v. MILLER.

RAILROAD.—*Complaint for Killing Live-Stock.*—A complaint before a justice of the peace against a railroad company for killing a cow belonging to the plaintiff charged that the animal was killed by a locomotive of the defendant, at a point where the railroad was by law required to be fenced, and where the same was not fenced.

Held, that the complaint was sufficient. It was not necessary to aver that the animal went upon the track at a place where the road was not fenced; the reasonable inference from the averments of the complaint being that the road was not securely fenced at the place where it went upon the track and was killed.

From the Vanderburgh Circuit Court.

T. Gazlay, W. H. DeWolf, F. M. Shackelford, and R. D. Richardson, for appellant.

G. G. Reily and W. C. Johnson, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellant, commenced before a justice of the peace in Knox county.

It is alleged in the complaint that in October, 1872, the plaintiff was the owner of a red cow of the value of fifty dollars; that the defendant, at that time, owned, used, and operated a railroad in and through the county, and that said

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defendant then and there, by a locomotive being so used and operated on said railway, at a point where the same was required by law to be fenced, and where the same was not fenced, ran against and over the plaintiff's said cow and thereby bruised and wounded her so that she could not be cured, and was therefore killed by a servant of the defendant; wherefore, etc.

Before the justice of the peace, there was judgment for the defendant, and the plaintiff appealed to the circuit court.

On application of the defendant, the venue was changed to the Vanderburgh Circuit Court. In that court a demurrer to the complaint which had been filed before the justice of the peace, alleging that the complaint did not state facts sufficient to constitute a cause of action, was overruled by the court, and to this ruling the defendant excepted. The cause was thereupon submitted to the court for trial, without the intervention of a jury, and the court found for the plaintiff, assessing the damages at forty dollars. The defendant moved the court for a new trial, alleging that the finding of the court was contrary to the law and evidence.

This motion was overruled and final judgment rendered for the plaintiff.

Two errors are properly assigned:

1. Overruling the demurrer to the complaint; and,
2. Refusing to grant a new trial.

The objection urged against the complaint is, that it does not aver that the road of appellant was not securely fenced at the point where the animal entered upon the road.

We are referred by counsel for the appellant to the case of *The Bellefontaine Railway Company v. Suman*, 29 Ind. 40, as authority for their position. There is no doubt but that the material question in all such cases is, whether or not the road was fenced at the point where the animal went upon it, and so far as we have been able to see, in every case where the point has been made, it has been so decided. *The Toledo, Wabash, and Western Railway Co. v. Howell*, 38 Ind. 447; *The Jeffersonville, Madison, and Indianapolis Railroad*

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Co. v. Avery, 31 Ind. 277; *The Indianapolis and Cincinnati Railroad Co. v. Adkins*, 23 Ind. 340. There are several cases, however, where the attention of the court seems not to have been particularly called to this point, in which the language might seem to justify the inference that the question is, whether the road was fenced at the point where the animal was killed. As liable to this remark, reference may be made to *The Bellefontaine Railway Company v. Reed*, 33 Ind. 476; *The Ohio and Mississippi Railroad Co. v. Hays*, 35 Ind. 173; and there are, doubtless, other cases.

It is probable that in most of such cases the place where the animal is killed is at or near that where it came upon the road.

In actions for animals killed on railroads, commenced before a justice of the peace, considerable liberality seems to have been indulged in deciding upon the sufficiency of the complaint. In *The Indianapolis and Cincinnati Railroad Co. v. Adkins*, *supra*, the language of the complaint was, that "at the place and time where said" animal "was killed by the defendant's locomotive and cars, the same was not securely fenced," etc. The court say: "We think this averment is sufficient. We cannot presume that the animals, after going on the track, had travelled along it, for any very considerable distance before they were killed, in the absence of an averment of that fact. The reasonable inference to be drawn from the averment, we think, is that the road was not securely fenced at the place where the animals went upon the track, and were there killed. If the fact was otherwise, it could be shown on the trial, and no prejudice could result to the defendant." We think the complaint was sufficient.

The remaining question relates to the sufficiency of the evidence to justify the finding of the court. It is urged that it does not show that the cow was killed in Knox county. We have carefully read the evidence as set out in the bill of exceptions, and think it shows this fact with reasonable certainty.

The judgment is affirmed, with costs.

HILL ET AL. v. MARSH ET AL.

PARTNERSHIP.—*Parties.*—Where a demand exists in favor of a partnership, and one of the partners refuses to join in an action for its enforcement, he may be made a defendant with the partnership debtor, in a suit brought by his co-partner.

SAME.—*Measure of Relief.—Judgment.*—In such case, where the defendant-partner filed an answer alleging that he had no knowledge of a claim by the partnership against his co-defendant, but averring that if it existed he was entitled to one-half thereof, and praying that judgment for his half might not be rendered in plaintiff's favor, it was error to render judgment in his favor against his co-defendant for one-half the sum found due to the partnership. To entitle himself to such judgment, he must have filed a cross complaint asking affirmative relief. The answer made no issue between him and the other defendant.

APPEAL.—*Evidence.*—Where the evidence is conflicting, the Supreme Court will not reverse a judgment on the weight of evidence.

PLEADING.—*Defect of Parties.*—A demurrer for defect of parties defendants lies only where a necessary party is not made a defendant, not because there are too many defendants.

From the Floyd Circuit Court.

G. V. Hawk and W. W. Tuley, for appellants.

D. C. Anthony, for appellees.

BUSKIRK, J.—In the court below, the appellee Samuel S. Marsh was the plaintiff, and the appellants and the appellee Jeremiah W. Malinee were the defendants.

The complaint alleged, in substance, that on the 14th of February, 1865, said Marsh and Malinee owned two-thirds of all the machinery, real estate, personal property, rights, credits, and interests belonging to the concern then owned by them and Hicks King, doing business under the firm name of S. S. Marsh & Co., known as the "Hoosier Rolling Mill;" that on said day Marsh and Malinee agreed with appellants to sell them one-third of their two-thirds in said rolling mill property for ten thousand dollars and ten per cent. advancement on seven thousand six hundred and sixty-one dollars and forty-six cents, the estimated value of the one-third of the two-thirds interest so held by said Marsh and Malinee, the said ten per cent. advance amounting to

the sum of seven hundred and sixty-six dollars, which sum of ten thousand dollars and advance of seven hundred and sixty-six dollars the appellants agreed to pay; that said Marsh and Malinee, at the time of the sale, transferred to appellants one-third of their interest in said property, and put them in possession, and fully performed their said agreement; but that appellants failed to perform their said agreement, in this, that they failed and refused to pay said Marsh and Malinee said sum of seven hundred and sixty-six dollars, and still refuse to pay the same; that the said Malinee utterly refused to permit said Marsh to join him as a co-plaintiff in this action; and said Marsh asked that said Malinee be made a defendant to answer to his interests, and for judgment for seven hundred and sixty-six dollars, and all other proper relief.

The appellants filed their demurrer to the complaint, assigning two grounds of objection:

1. That said Malinee was a necessary plaintiff to the action.
2. That said Malinee was not a necessary or proper defendant to the action.

The demurrer was overruled, and appellants excepted.

This ruling is assigned for error, and presents the first question arising in the record for our decision.

Upon the first cause of demurrer, appellants' counsel concede that, under the averments of the complaint, the objection is not well taken. Because if the said Malinee was a necessary party plaintiff in this action, and if, as alleged in said complaint, said Malinee utterly refused to be made a plaintiff in this action, then, under the nineteenth section of the code, 2 G. & H. 47, Marsh had the right to make him a defendant.

But it is insisted by counsel for appellants, that if the said Marsh and Malinee were not so united in interest as to make Malinee a necessary party plaintiff, then he was not a necessary or proper party defendant, and the demurrer should have been sustained upon the second ground.

Hill et al. v. Marsh et al.

The demurrer was on the part of the appellants, assigning for cause that their co-defendant was not a necessary or proper party defendant. This did not constitute a ground of demurrer. It is settled by repeated decisions of this court, that a defect of parties, as a cause of demurrer under the code, means too few, and not too many parties. *Bennett v. Preston*, 17 Ind. 291; *Berkshire v. Shultz*, 25 Ind. 523.

There was no error in overruling the demurrer to the complaint.

The appellants then answered in denial.

The appellee Malinee also filed a separate answer to said complaint, alleging, in substance, that on February 14th, 1868, he was an equal partner of the said Marsh in the interest then held by him in his own name in said Hoosier Rolling Mill described in the complaint; that he and said Marsh agreed to sell to said appellants one-third of their interest in said property for ten thousand dollars; that said Marsh made said sale for himself and said Malinee; that said Marsh told him, Malinee, that he had made said sale to appellants for ten thousand dollars, but did not then or afterward tell said Malinee that appellants were to pay ten per cent. advance on said purchase-money, or any part thereof; but on the contrary, said Marsh concealed from said Malinee any agreement by appellants to pay any advance on said purchase-money, or any part thereof, or anything more than said ten thousand dollars; that said Malinee never heard of any such agreement until after the commencement of this action. And the said Malinee averred that if said agreement was made by said appellants to pay said ten per cent. advance, as alleged by Marsh in his complaint, of which said Malinee has no knowledge, the one equal half of such advance belonged to him; and he prayed the court to so determine, and not to render judgment in favor of said Marsh for any money due said Malinee, and for all other proper relief.

Marsh filed a reply in denial of the answer of Malinee.

There was a trial by the court, and a finding in favor of Marsh against appellants for three hundred and eighty-three

dollars and seven cents, and in favor of said Malinee against appellants for three hundred and eighty-three dollars and seven cents.

The appellants moved the court for a new trial, for the reasons that the finding was contrary to law and not supported by sufficient evidence. The motion was overruled, and appellants again excepted; and this ruling is assigned for error.

We are asked by counsel for appellants to reverse the judgment, because the finding is not supported by sufficient evidence. This we cannot do. Marsh and his book-keeper, Lake, swore positively that appellants agreed to pay ten per cent. advance on the purchase-money. Hill testified just as positively that no such contract was made. No other person was present at the time of the purchase but the three persons named. Payne and Malinee testified that they knew nothing of such agreement, and had never heard of it until after the commencement of this action. There was some evidence offered tending to contradict Malinee on this point. There were, however, other facts and circumstances detailed in the evidence, which tended very strongly to corroborate and sustain the evidence of Hill; but this was for the court to weigh and consider. There was a direct conflict upon the most material point. In such case we cannot disturb the finding. *The Madison, etc., R. R. Co. v. Taffe*, 37 Ind. 361. It is also contended by counsel for appellant, that the finding and judgment in favor of Malinee cannot be sustained, because there was no issue between him and appellants. This objection is well taken. Malinee filed an answer to the complaint, but he did not even ask for a judgment in that. He only asked that the court would not render a judgment in favor of Marsh for any money that might be found due him. If he desired a judgment against appellants, he should have filed a cross complaint, and asked for affirmative relief. This he did not do. There was no issue upon which there could have been a finding and judgment in his favor. He simply asked the court to protect his rights as

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against Marsh, and this was done when the court only found for Marsh in only one-half the sum due.

The judgment in favor of Marsh is affirmed, with costs; and the judgment in favor of Malinee is reversed, with costs; and as to him the cause is remanded for further proceedings, in accordance with this opinion.

REID ET AL. v. HAWKINS.

CIRCUIT COURT.—*Statute Fixing Time of Holding Court.*—By section 9 of the act approved March 6th, 1873, the counties of Decatur, Rush, and Fayette were constituted the Eighth Judicial Circuit. Section 47 fixed the times of holding the circuit court in Decatur county on the first Monday of February, to continue four weeks; in Rush county on the Monday succeeding the court in the county of Decatur, to continue four weeks; and in the county of Fayette on the Monday succeeding the court in the county of Rush. The times for holding the courts in Decatur and Rush counties had passed when the act took effect, but it was in force at the time fixed for holding the court in Fayette, and it was so held. This was right. The term was not invalidated by the circumstance that the act was not in force in season for holding courts at the time prescribed in Decatur and Rush.

EVIDENCE.—*Failure to Except.*—An objection to the admissibility of evidence cannot be made for the first time in the Supreme Court. If admitted on the trial in the court below without objection, it must be held to have been admitted by the consent of the party affected by it.

From the Fayette Circuit Court.

J. S. Reid, W. Morrow, and N. Trusler, for appellants.
J. C. McIntosh, for appellee.

BUSKIRK, J.—This was an action by the appellee, upon a note executed by John S. Reid and John Caldwell. The complaint alleged the death of John Caldwell and the appointment of William and James Caldwell as his administrators. The action was commenced against Reid and the administrators of John Caldwell, but James Caldwell did not answer, nor was he defaulted.

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There was issue, trial by the court, and finding for the appellee, and, over motion for a new trial, judgment on the finding.

The appellants have assigned for error the sustaining of the demurrer to the first paragraph of the answer and overruling the motion for a new trial.

The answer was as follows: "Now comes the defendant John S. Reid, and for answer in his own behalf and that of William Caldwell, one of the administrators of John Caldwell, says that the said court, at the present term thereof, has no jurisdiction of the aforesaid complaint and cause of action. Because he says that the regular March term of said court, according to the act of the General Assembly of the State of Indiana, approved 22d day of April, 1869 (p. 45), should have been held on the third Monday of March, 1873, in said county, and not on the fifth Monday of said month, as is now held; and avers that at the last session of the General Assembly of the State of Indiana, by an act approved the 6th day of March, 1873, the said legislature so changed and altered the number of the circuit, of which your Honor was elected in and to the same, being the Fourth Judicial Circuit, to that of the Eighth Judicial Circuit, and changed the time of holding the courts in said circuit. Viz., in the county of Fayette from the second Mondays in March and September to the first Mondays succeeding the holding of the circuit court in the county of Rush, and that by said act, the commencement of the circuit courts in said new circuit was to begin on the first Monday of February, in the county of Decatur, which county was to hold four weeks, if necessary, and afterward in the county of Rush, on the Monday succeeding the courts in the county of Decatur, which was to hold four weeks in Rush, if necessary, then on the first Monday in the county of Fayette succeeding the holding of the courts in the said county of Rush; and the defendant avers that no such court has been held under said act, either in the county of Decatur, or time sufficient after the approval of said act to have held court in said county under said law,

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or in Rush, and that the holding of the present term of the Fayette Circuit Court is wholly illegal and void, and that neither the court nor judge thereof has jurisdiction of the person of the defendants or the cause of action alleged in said complaint at the present time; wherefore they pray judgment for costs, etc., and abatement of said action."

The counties of Decatur, Rush, and Fayette constitute the eighth judicial circuit. See sec. 9, Acts 1873, page 87.

The times of holding court in said circuit are fixed by the forty-seventh section of the act of March 6th, 1873, as follows:

"Sec. 47. The terms of said court in the eighth circuit shall be held in the county of Decatur on the first Monday in February, the fourth Monday in April, the first Monday in September, and the third Monday in November of each year; in the county of Rush on the Mondays succeeding the courts in the county of Decatur; and in the county of Fayette on the Mondays succeeding the courts in the county of Rush. The courts in the county of Decatur shall continue four weeks, in the county of Rush four weeks, and in the county of Fayette three weeks at each term, if the business thereof requires it." See Acts 1873, p. 90.

The act of March 6th, 1873, abolished the common pleas courts, and repealed, by implication, all existing laws prescribing the times of holding circuit courts, except the provision made in the eighty-third section for such courts as might be in session at the taking effect of said act. Such act took effect on the 6th day of March, 1873. When the act took effect, the terms of court in Decatur and Rush counties had passed. That is, the entire time in Decatur county had expired and the time fixed for commencing the term in Rush county had passed, and consequently no court was held in either of said counties. The court was held in Fayette county on the fifth Monday in March, 1873, the time prescribed by said act.

The position assumed by counsel for appellants is, that such term was illegally held, because the terms in Decatur and Rush counties had not been held. If the strict and

literal construction contended for be correct, then no legal circuit court was held in the State for the year 1873, after the taking effect of said act. We do not think the construction insisted upon is correct. It is not reasonable. It does not give effect to, but defeats, the plain purpose of the legislature. The section, in legal effect, provided that the court should be held for the year 1873 in Fayette county on the fifth Monday in March. It was held at that time. It was well known to the legislature that the terms as fixed in said act for holding the February and March courts in Decatur and Rush counties, could not be held. The legislature did not contemplate the *hiatus* which would result from the construction contended for. The legality of the term of court in Fayette county, which was held at the time fixed in said act, can not be affected by the fact that the terms of court as fixed by said act were not held in Decatur and Rush counties. The question involved here was, in principle, decided by this court in *Phillips v. Stewart*, 17 Ind. 154. There an act took effect in October, 1860, providing for the times of holding the Tippecanoe Common Pleas Court. The court say:

"As this act did not take effect until October, 1860, it is claimed that no court could be held in December of that year, inasmuch as the statute names the times in the order of 'March,' 'June' and 'December.' We are not inclined to adopt the construction contended for. It seems to us that the law authorized a term to be held in December following the time when the act took effect, although that term was the last named in the section fixing the terms of the court. We see no sufficient reason for supposing that the legislature intended a *hiatus* in the terms, from the time that act took effect until the next March. The term of the court was, as we think, authorized by the statute."

There is, in our opinion no room to doubt that the Fayette Circuit Court was legally held on the fifth Monday in March, 1873.

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It is also claimed that the court erred in overruling the motion for a new trial.

The only error complained of is, that the court permitted the note sued on to be read in evidence without proof of its execution by John Caldwell. It is a sufficient answer to this objection to say, that the note was read in evidence without objection or exception. The appellants cannot be heard to complain in this court of a ruling of the court below, which was made without objection or exception on their part. It may be that the court below would have sustained the objection which is urged to the competency of such note in evidence, if the attention of the court had been called to it. The note, having been read in evidence without objection, is presumed to have been read with the assent of appellants, and they can not complain of that to which they assented.

The judgment is affirmed, with costs and five per cent. damages.

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SAMPLE ET AL. v. MARTIN.

GUARANTOR.—Promissory Note.—Extension of Time to Maker.—An answer by a guarantor to a complaint on a note, that the payee extended the time of payment to the maker, is fatally defective if it does not show a definite time of extension and a consideration for the agreement to extend.

SAME.—Parties who guarantee the payment of a promissory note by indorsing thereon and signing these words at the time of its execution, “We guarantee payment,” are neither sureties nor indorsers, but guarantors, and they are not discharged by a failure to use diligence to collect the note of the maker; nor can they require the holder to sue the maker, as provided by statute in case of sureties.

From the Tippecanoe Common Pleas.

G. McWilliams, for appellants.

WORDEN, C. J.—Suit by the appellee against the appellants. Judgment for plaintiff.

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The complaint, alleges in substance, that on the 4th of February, 1870, one Dennis Smith executed to the plaintiff a promissory note for the sum of five hundred and twenty-five dollars, payable six months thereafter, and that the defendants, Sample and Hardy, in consideration that the plaintiff would lend said Smith the sum of money specified in the note at the time of the execution thereof, made their written guaranty thereon in these words, viz., "We guarantee payment.

(Signed)

"JAMES G. HARDY,
"H. T. SAMPLE."

That when the note matured, Smith wholly failed to pay the same or any part thereof, of which the defendants had due notice; that afterward, viz., on the 30th day of September, 1871, the plaintiff gave the defendants further notice of the failure of Smith to pay the note and demanded of them payment thereof, which they refused; that the note remains due and unpaid; wherefore, etc.

There was a demurrer filed to the complaint for want of sufficient facts, but it was overruled, and exception taken, and this ruling is assigned for error. There is no objection pointed out in the brief of counsel for the appellant in respect to the complaint. We, therefore, regard it as good.

Answer. 1st. Want of consideration.

2d. That no notice was given to the defendants of the failure of Smith to pay the note until about the 4th of April, 1871; that the plaintiff failed to sue Smith, although he and Smith resided in Fountain county, Indiana, though several terms of court intervened between the maturity of the note and said 4th of April, at which suit might have been brought; that at the maturity of the note, Smith had property liable to execution, sufficient to pay the note, which might have been collected but for the plaintiff's neglect in failing to give the defendants proper notice of non-payment, and in failing to sue Smith thereon; that between the maturity of the note and said 4th day of April, Smith disposed of his property and lost and wasted the same, so that when

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judgment was rendered against him on the note, eighty dollars was all that could be collected from him; that he is now insolvent, etc.

The 3d paragraph is in these words:

"And defendants say that after said note became due, the said Dennis Smith, without the knowledge of these defendants, contracted with the said Jacob Martin for an extension of the time of the payment of the same until on or about the — day of April, 1871, and which time was so extended; wherefore," etc.

4th. General denial.

Reply in denial of first and second paragraphs, and demurrer sustained to the third. The demurrer was correctly sustained. The paragraph, if otherwise sufficient, is fatally defective in not showing a definite time of extension, and in not showing a consideration for the agreement to extend. For aught that appears, the contract was a *nudum pactum*, and suit might have been brought against Smith on the note at any time thereafter. The plaintiff's hands do not appear to have been tied up by any valid contract for an extension of time.

We are asked to reverse the judgment on the evidence, upon the ground that the plaintiff failed to sue Smith when he was solvent and able to pay, afterward becoming insolvent, whereby the defendants, it is claimed, ought to be discharged. The defendants are neither sureties nor indorsers, but guarantors. They are not discharged by a failure to use diligence to collect the note from the maker, nor could they require the plaintiff by notice to sue the maker, as is provided by statute in case of sureties.

The judgment below is affirmed, with costs and five per cent. damages.

The Indianapolis, etc., R. W. Co. v. McBrown.

THE INDIANAPOLIS, BLOOMINGTON, AND WESTERN R. W. CO.
v. MCBROWN.

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RAILROAD.—Killing Animals.—Statute.—It is essential to the liability of a railroad company, under the acts of 1853 and 1863, for the death or injury of an animal, that the animal should be actually touched by the engine, cars, or other carriages.

SAME.—Negligence at Common Law.—Wilful Negligence.—Where the track of a railroad passed through a cut eighty rods long, and a horse of the owner of the land was near the track at the entrance of the cut, and the whistle of an approaching engine was sounded, and the horse ran upon the track and into the cut, whence it could not escape up the sides, and the engine was run on and the whistle sounded, thereby continuing to frighten the horse until it jumped into a trestle-work at the other end of the cut and was killed, when the engine could have been stopped after the horse was in the cut and before it jumped into the trestle-work;

Held, that the company was guilty of such negligence as rendered it liable at common law for the value of the horse. The negligence in such case is wilful.

From the Fountain Circuit Court.

J. C. Black, L. Nebeker, and S. M. Camborn, for appellant.
H. H. Stilwell, T. L. Stilwell, and L. P. Miller, for appellee.

BUSKIRK, J.—The assignments of error call in question the action of the court in overruling the demurrer to the amended complaint and the motion for a new trial. The allegations of the complaint were fully proved upon the trial. The verdict of the jury was fully supported by the evidence. The only question for our decision is, whether, upon the facts averred in the complaint, the appellant is liable.

The amended or substituted complaint, omitting the formal parts, is as follows:

“Elam S. McBrown, the above named plaintiff, complains of the Indianapolis, Bloomington, and Western Railway Company, defendant herein, and says that on the 10th day of April, 1872, the defendant was the owner of a line of railroad between Indianapolis, Indiana, and Peoria, in the State of Illinois, passing through said county of Fountain and across the lands of said plaintiff, and defendant is also the owner of the engines and cars running on said railroad,

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which at the date above mentioned was not fenced; and plaintiff's mare at said date was running at large on plaintiff's own unfenced lands, and then and there wandered upon the track of said defendants at a point at the west end of a cut, ranging from three to ten feet deep, and fifteen feet in width, and eighty rods long, made by defendant to construct their track in, and in which they constructed their said track; and while said mare was at the west end of said cut on said track as aforesaid, without any fault or negligence on the part of plaintiff, there came an engine drawing a tender, eastward bound, each belonging to the defendant and in their employ, managed by, and in the care and custody of, an engineer and fireman, each of whom was at the time in the employ and service of defendant; and that said engineer and fireman, on approaching near the point where said mare was standing, sounded the whistle on said engine and hallooed loudly, and by reason of the sounding of said whistle and said hallooing, said mare became greatly frightened and ran eastward along and on said track in said cut; and that said engineer and fireman continued to sound said whistle, and continued hallooing, and then and there carelessly and negligently failed to check said engine, which they could easily have done many times during the time, from the time said mare took fright and the time she was killed, as hereinafter set forth; and that said engineer and fireman then and there negligently and carelessly continued to sound said whistle and continued said hallooing, and thereby caused said mare to continue frightened while she ran on said track in said cut at her greatest speed, and could not then and there get out of said cut on either side, until arriving immediately at the east end of said cut, at which place there was a trestle-work over a drain, of the existence of which said engineer and fireman had full knowledge at the time; and that by reason of said engineer and fireman negligently and carelessly failing to check the speed of said engine, which they could easily have done as above stated, and also by reason of the continuation of the sounding of said whistle and said hallooing, thereby

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caused said mare to run into said trestle-work, in which she then and there became entangled and fell, which fall caused her death.

"That said mare was of the value of one hundred and fifty dollars, for which amount plaintiff demands judgment, and other proper relief."

It is essential to the liability of a railroad company under the acts of 1853 and 1863, for the death or injury of an animal, that the injury should be direct; that is, that the animal should be actually touched by the engine, cars, or other carriages. The language of the first act is, "shall be killed or injured by the cars or locomotive, or other carriages." See 1 G. & H. 522. The language of the last act is "for stock killed or injured by the locomotives, cars, or other carriages of such company." 3 Ind. Stat. 413. It was held by this court in *The Peru, etc., R. R. Co. v. Hasket*, 10 Ind. 409, that the railway was not liable under the act of 1853, unless the animal was touched by the locomotive or some part of the train. The language of the act of 1863 is in substance the same as that of 1853, and the legislature is presumed to have passed it in view of the construction given to the act of 1853. See the cases collected in note 3, on page 416, 3 Ind. Stat. In the present case, the appellee's mare was not even touched by the locomotive or any part of the train, and consequently the appellant is not liable under the act of 1863.

We proceed to inquire whether the appellant is liable at common law. Was the appellant guilty of negligence? The track of the railroad ran through the lands of the appellee. The mare of the appellee, with seven other horses, was near the track. A locomotive and tender were passing over the track, going east. When the horses were discovered, the whistle was sounded, and the men on the engine hallooed. This action of the persons in charge of the engine was proper. The sounding of the whistle is the usual mode of frightening stock from the track of a railroad. The reasonable presumption was, that the horses would run away from the track, but instead, they ran on the track into the cut. The

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employees of the appellant are chargeable with notice of the condition of the cut and the danger to the horses. It is averred that the horses could not escape from the cut on either side of the track, until arriving immediately at the east end thereof, at which place there was a trestle-work over a drain. With a knowledge of these facts, the engine should have been stopped, but the engine pursued the horses in the cut and continued to sound the whistle, which caused them to run at their highest speed, and the plaintiff's mare fell into the trestle-work and was killed. It is also averred that the engine could have been easily stopped after the appellee's mare was in the cut and before she fell into the trestle-work.

It is claimed by counsel for appellant that the dangerous character of the trestle-work is not sufficiently shown in the complaint. It alleges that a trestle-work was made over a drain at the east end of the cut. A trestle is defined by Webster as follows: "3. In bridges, a frame consisting of two posts, with a head or cross beam and braces, on which rest the string-pieces." It seems to us that the averment that a trestle existed over a drain at the east end of the cut is sufficient to show that it was unsafe and dangerous for horses to pass over it. The cut was eighty rods long. The banks were too steep for the horses to escape in that way. The trestle existed at the east end of the cut. The engine was behind them, sounding its whistle, and running with unabated speed, until the mare in question, in attempting to leap the trestle, became entangled, fell, and killed herself. The engine was then suddenly stopped. It should have been stopped sooner. In our opinion, the employees of appellant were guilty of gross negligence after the horses got into the cut. The sounding of the whistle before the horses ran into the cut was proper and manifested care and caution. The pursuing of them into the cut and forcing them to attempt a dangerous leap manifested a reckless disregard of human life, and the safety of the property of the citizen. The allegations of the complaint make out a plain and clear case of

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wilful negligence. The injury was intentionally and wilfully committed. This relieves the case of any question of contributory negligence. The complaint was sufficient.

The evidence not only justified but required the verdict. It shows that there were seven other horses with the mare of the appellee; that they were forced almost in a body upon the trestle; that six of them went over in safety; that one injured his leg; and the other was killed. The number of horses made the conduct of the employees more reckless than if there had been only one, as it was far more dangerous for eight horses to pass such a place, crowded together, than for one. The trestle was from eight to ten feet high and from twelve to sixteen feet long.

The judgment is affirmed, with costs and ten per cent. damages.

THE STATE, EX REL. WADE, *v.* JOEST ET AL.

For the questions presented and decided in this case, see *The State, ex rel. Huston, v. Joest, post*, p. 235.

From the Posey Circuit Court.

A. P. Hovey and G. V. Menzies, for appellant.

J. Pitcher, H. C. Pitcher, E. M. Spencer, and W. Loudon, for appellees.

DOWNNEY, J.—Suit by the appellant against the appellees on the bond of Joest, as administrator of the estate of Rhodes Rogers, deceased. It is alleged in the complaint, that Joest made final settlement of the estate of said deceased, in November, 1871, and that thereupon the court ordered him to pay to the relatrix the sum of twelve hundred and seventy-five dollars, as her share of the estate; that a demand

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had been made on him for the amount, which he had refused to pay.

The defendants answered that on the 8th day of November, 1870, said Joest paid to the United States revenue collector for the district in which he held said estate twelve dollars and fifty-seven cents, that being the amount of the succession tax levied upon said distributive share; and on the 8th day of March, 1870, said Joest advanced to said plaintiff one hundred dollars, and on the 1st day of September, 1870, seven hundred and forty-nine dollars and twenty-eight cents, and on the 24th of January, 1871, four hundred and thirty-one dollars and ninety-two cents, making in all an excess of thirty-one dollars and eleven cents above the amount of her distributive share; wherefore, etc.

The plaintiff replied that said advancements mentioned in said paragraph of said answer were made to said Mary J. Wade, when she was an infant under the age of twenty-one years; wherefore, etc. Second. That the advancements mentioned in said paragraph of said answer were made to the said Mary J. Wade when she, the said Mary J., was an infant under the age of twenty-one years, and were not for any necessaries suitable to her condition in life; wherefore, etc.

The defendants demurred separately to each of the paragraphs of the reply, and the demurrers were sustained. The ruling of the court in sustaining the demurrers to the paragraphs of the reply are the errors assigned.

The questions presented in this case are decided in the case of *The State, ex rel. Hutson, v. Joest, post*, p. 235, against the appellees.

The judgment is reversed, with costs, and the cause remanded.

The State, *ex rel.* Hutson, *v.* Joest *et al.*

THE STATE, EX REL. HUTSON, *v.* JOEST ET AL.

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GUARDIAN AND WARD.—*Decedents' Estates.*—*Marriage of Infant Female.*—An infant female when married to a man of full age can have no guardian, and she may receive her estate from her guardian, and may also receive her distributive share of her father's estate, with the assent of her husband.

SAME.—A payment made to the husband by such administrator or guardian, with her assent and by her direction, is good as to her.

SAME.—If both the husband and wife are infants, such payments will not be good.

SAME.—If such payments have been made while both the husband and wife were infants, the money so paid need not be tendered back before suit is brought by the wife to recover the same of such guardian or administrator.

From the Posey Circuit Court.

A. P. Hovey and G. V. Menzies, for appellant.

J. Pitcher, H. C. Pitcher, E. M. Spencer, and W. London, for appellees.

DOWNEY, J.—Suit by the appellant against the appellees, on a bond given by the appellees for the faithful discharge of his duties by Joest, as administrator of the estate of one Rhodes Rogers, deceased. The complaint alleges that the court ordered Joest to make final settlement and distribution of said estate; that on such settlement there was due the relatrix twelve hundred and fifty-two dollars and sixty-six cents; that demand had been made on Joest to pay the same to her, which he had failed and refused to do.

The defendants answered:

1. That after the order of distribution was made and while a portion of said distributive share yet remained in the hands of said Joest, a succession tax amounting to twelve dollars and fifty-seven cents was levied upon said share by the United States revenue assessor of the district in which he held said estate, which amount he paid to the collector of revenue for said district. And they aver that on or about the 1st day of March, 1870, said Joest conveyed to Richard Hutson, the husband of the relatrix, in accordance with her directions and consent, a certain house and lot situated in

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the town of Wadesville, etc., which house and lot said Martha Hutson and her said husband, who was then of the age of twenty-one years, accepted as a payment of nine hundred dollars, made in advance, upon her said distributive share, and she and her said husband used and occupied said house and lot for the term of one year, and then sold the same for the sum of one thousand four hundred dollars; and on the 15th day of May, 1871, said Joest paid to her and her said husband the further sum of one hundred dollars; and on the 1st day of July, 1871, he paid to her and her said husband the further sum of one hundred and twenty-five dollars; and on the 1st day of October, 1871, he paid the further sum of eight dollars and sixty cents; and on the 15th day of November, 1871, he paid the further sum of one hundred and one dollars and thirty-six cents to her said husband, at her instance and request; and the remainder of said distributive share, amounting to fifteen dollars and fifteen cents, he tendered to the relatrix, Martha Hutson, before the commencement of this action, and has ever since kept the same for her use, and they now here bring into court the sum of sixteen dollars for the use of said relatrix; wherefore, etc.

3. That upon final settlement, the distributive share of the relatrix in said estate was found by the court to be one thousand two hundred and sixty-two dollars and sixty-two cents; and that on March 1st, 1870, said Joest paid in advance to the husband of said relatrix, with her consent, the sum of nine hundred dollars, and on the 12th day of May, 1871, the further sum of one hundred dollars, and on the 24th day of July, one hundred and twenty-five dollars, and on the 18th day of October, eight dollars and sixty cents, and on the 15th day of November, one hundred and one dollars and thirty-six cents, and on the 8th day of November, 1871, he paid the succession tax levied upon the same, amounting to twelve dollars and fifty cents; and before the commencement of this action he tendered the remainder of her said distributive share to her, to wit, fifteen dollars and fifteen cents, and they now here bring the said sum into court for her use. Defendants aver that the hus-

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band of said relatrix, Richard Hutson, was, at the time said payments were made, of the age of twenty-one years; wherefore, etc.

There is no second paragraph of answer in the record.

To the first paragraph of the answer the plaintiff replied:

1. That the payments mentioned in said paragraph of said answer were made to said Martha Hutson when she was an infant, under the age of twenty-one years.

2. That the said payments were made to the said Martha Hutson and Richard Hutson, when she was an infant under the age of twenty-one years, and were not made to her for any necessaries suitable to her condition in life; wherefore, etc.

4. That at the time of the payments mentioned in said paragraphs and at the time of the conveyance of said house and lot to the said Richard Hutson, and at the time of the conveyance of the same by the said Richard Hutson and Martha Hutson, she, the said Martha, was an infant under the age of twenty-one years; wherefore, etc.

To the third paragraph of the answer, the plaintiff replied as follows:

5. That the payments mentioned in said paragraph were made when she, the said Martha Hutson, was an infant under the age of twenty-one years; wherefore, etc.

To both paragraphs of the answer, the plaintiff replied as follows:

6. That the said payments mentioned in the answer were made to said Richard and Martha Hutson, when they, the said Richard and Martha, were infants under the age of twenty-one years; wherefore, etc.

There is no third paragraph of reply in the record.

The defendants demurred to the several paragraphs of the reply separately, and the paragraphs were all adjudged bad; and thereupon judgment was rendered for the defendants.

The rulings of the court on the demurrers to the paragraphs of the reply are the alleged errors. By the twelfth section of the act relating to guardian and ward, 2 G. & H. 568, it was enacted, that the marriage of any female ward to

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a person of full age should operate as a legal discharge of her guardianship; and the guardian was authorized to account to her husband in the same manner as if she had arrived at full age. This act was so amended by an act in 1863, 3 Ind. Stat. 283, as to authorize the accounting to the wife with the assent of the husband. The object of the amendment was, no doubt, to prevent the husband from getting possession of the estate of his wife in the hands of her guardian without her consent. At common law, doubtless, the husband might receive and retain the distributive share of his wife in the estate of her father. Now, however, such share is her own separate property, which the husband has no right to receive and retain as his own property. Acts 1853, p. 57, copied in 1 G. & H. 295.

The effect of the statute to which we have referred is, that an infant female, when married to a man of full age, can have no guardian; and we think it must follow that she may receive her estate from her guardian, and may also receive her distributive share of her father's estate, with the assent of her husband. If she can not do so, then no payment can be made to her or for her use and benefit until she has arrived at full age. We think that a payment made to the husband, with her assent and by her direction, is good as to her. It is, in substance, a payment to her. We come to the conclusion, then, that the first, second, fourth, and fifth paragraphs of the reply were bad. The sixth paragraph of the reply, which alleges that both the husband and wife were infants, we think, is good.

It is said in the brief of counsel for appellant, that the circuit court decided the case against the appellant on the ground that "the plaintiff did not tender back the money nor allege she did not have it." Conceding, as alleged in the sixth paragraph of the reply, that both the husband and the wife were infants, we think the reply good without a tender or offer to return the money or to reconvey the land. If she should be held bound to return the money, etc., the payment might as well be held valid, notwith-

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standing the infancy of her and her husband. If she could not refund the money, etc., the payment must stand good. It has been frequently held by this court that when an infant has sold and conveyed his real estate, he need not, in order to disaffirm the deed, return the purchase-money. *Miles v. Lingerman*, 24 Ind. 385; *Pitcher v. Laycock*, 7 Ind. 398; *Law v. Long*, 41 Ind. 586. We see no reason why the same rule should not apply in this case. The protection which the law designs to afford to infants can not be extended to them in any other way. If administrators, guardians, and others having the money of infants in their hands can deliver it to them, and thus put it in their power to squander it, and when called to account can insist that the squandered money shall be restored before they shall be required to account, the protection designed to be afforded to infants amounts to nothing. Because of the ruling of the court on the demurrer to the sixth paragraph of the reply, the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the sixth paragraph of the reply, and for further proceedings.

**THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY
v. GRAHAM.**

PLEADING.—*Negligence.*—*Wilful Injury.*—*Railroad.*—A complaint against a railroad company alleging that the plaintiff was on the track of the defendant's road, and without any warning to him, and without any fault on his part, the locomotive was negligently run against him, etc., is substantially good. Such complaint is also good, if it is alleged that the defendant wilfully and purposely and with great force ran the locomotive against the plaintiff.

RAILROAD.—*Agents and Servants.*—*Line of Duty.*—*Wilful Acts.*—The agents and servants of a railroad company while engaged in running a train of cars are in the line of their duty, and for their acts wilfully done while so engaged the company is liable.

PRACTICE.—*Motion to Strike Out.*—A judgment will not generally be reversed because the court below has refused to strike out part of a pleading.

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SAME.—*Bill of Exceptions.—Instructions Given.*—Where instructions given are not included in any bill of exceptions or signed by the judge, though copied by the clerk in connection with the reasons for a new trial, they are not before the Supreme Court for any purpose.

SAME.—*Instructions Refused.*—Where instructions refused are copied by the clerk in connection with the reasons for a new trial, but are not in a bill of exceptions and are not signed by anybody, and it is not noted upon them by counsel that they were refused and excepted to, they are not in the record.

NEGLIGENCE.—*Contributory Negligence.—Railroad.*—Where a person walked upon the track of a railroad, knowing that it was time for a train going in the same direction, and looked back several times, but did not see the train or hear any signal, though he thought he heard it come to the point from which he started, and he could have seen the train for nearly a quarter of a mile, but did not observe it until it struck him, and he was injured thereby, and those in charge of the train, on observing that said person was heedless of the approaching danger, made the usual efforts to stop the train and avoid running upon him;

Held, that he could not recover for the injury.

SAME.—*Walking on Track.*—It cannot be required of persons managing a locomotive and train of cars that they shall stop the train whenever any one is seen upon the track, especially at points where many persons are passing and crossing the track. They have a right to presume that persons walking along or across the track will not remain until an approaching train is upon them.

From the Putnam Circuit Court.

R. W. Thompson, D. E. Williamson, and A. Daggy, for appellant.

S. Claypool, C. C. Matson, L. P. Chapin, and J. McClary, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellant. The complaint consisted of three paragraphs. The defendant demurred separately to each paragraph, on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrers were all overruled. The defendant then moved the court to strike out part of the third paragraph of the complaint, which motion was also overruled. The defendant then put the case at issue, by a general denial of the complaint. A trial by jury ended in a verdict for the plaintiff. A motion made by the defendant for a new trial was overruled, and final judgment was rendered for the plaintiff.

The errors assigned present the questions as to the suffi-

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ciency of the complaint, the correctness of the ruling of the court in refusing to strike out part of the third paragraph of the complaint, and refusing to grant a new trial.

In the first paragraph of the complaint, it is alleged that at the time of the grievances mentioned, to wit, on the 27th day of April, 1870, the defendant so negligently managed its road that a conductor, engineer, and other employees in the employ of said company were running a locomotive and train of passenger cars on its track west from Greencastle, etc., and did then and there so carelessly and negligently run and manage said locomotive and train, that without giving the plaintiff any warning of the approach of said locomotive and train, the locomotive drawing said train was then and there negligently run against the plaintiff with great force and violence, without any fault of the plaintiff; by means whereof one of the legs of said plaintiff was broken, and he was then and there greatly bruised, hurt, and wounded, from which he suffered great bodily pain for sixteen months, and was during that time, and still is, wholly hindered and disabled from attending to his affairs and following his trade, is injured in his health, and in the use of his leg, and has incurred expense, etc.; wherefore, etc.

In the second paragraph, it is alleged that, on, etc., the plaintiff was walking on the track of the road of said company, on the ends of the ties of the track, going from Greencastle to Greencastle Junction, in, etc.; that he did not know that a locomotive and train of cars was approaching him; that the employees of the company well knew that the plaintiff was on the track, and in danger; yet the defendant so negligently managed its road that the conductor, engineer, and other employees of the company, running a locomotive and train of cars on said road, so carelessly run and managed the same, that without giving the plaintiff warning of the approach of the same, the locomotive, etc., were then and there wilfully and purposely, and without any regard to the life or rights of the plaintiff, with great force and violence,

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run against him, without any fault of the plaintiff; by means whereof one of his legs was broken, etc., concluding as in the preceding paragraph.

In the third paragraph, it is alleged that, on, etc., that portion of the defendant's road between Greencastle Junction and the depot at or near Greencastle had long been, and then was, used with the license and consent of the defendant as a way for foot passengers to pass and repass in and along; and the plaintiff, on, etc., was passing on the said portion of the road on foot, as he had been accustomed to do; and the defendant, well knowing the premises, on, etc., wilfully and purposely, and without any regard for the rights or life of the plaintiff, with great force and violence, ran their locomotive against him, without any fault on his part; by means whereof, etc., concluding as in the first and second paragraphs.

It must be understood, although the fact is not expressly stated in the first paragraph of the complaint, that the plaintiff was on the track of the road, for otherwise he would not have been struck by the locomotive. The facts are, then, that the plaintiff was on the track of the defendant's road, and without any warning to him, and without any fault on his part, the locomotive was negligently run against him. Substantially, we think, this is a good cause of action. We cannot say, from the simple fact that the plaintiff was on the track of the road at the time, that he was guilty of negligence contributing to the injury, when it is alleged that the plaintiff was without fault. It cannot be inferred that he was wrongfully on the road, for then he would not have been without fault. The particulars with reference to this could have been, and probably were, disclosed by the evidence.

The second paragraph is clearly sufficient. The plaintiff it is alleged was on the track of the road of the defendant, without fault on his part, and the defendant "wilfully and purposely, and without any regard to the life or rights of the plaintiff, with great force and violence, ran the locomotive against him." If it could be said that the plaintiff was neg-

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ligently and wrongfully on the track of the road, still this would not warrant the defendant in "wilfully and purposely" running upon him. *The Evansville and Crawfordsville R. R. Co. v. Lowdermilk*, 15 Ind. 120; *Wright v. Brown*, 4 Ind. 95; *Davies v. Mann*, 10 M. & W. 546.

The third paragraph is in all essential respects like the second. Whether the allegation that the portion of the road in question was used as a footway for persons to travel upon, with the consent of the company, is material or not, it is alleged that the plaintiff was upon the track of the road, and that without any fault on his part the locomotive was wilfully and purposely run upon him.

Counsel for appellant contend, however, that the action cannot be maintained against the company for the wilful and intentional act of the servant of the company, not occasioned in the course of his employment, and in pursuit of the regular business of the company. This is probably true. But in this case the agents and servants of the company were in the line of their duty in running the train; and for their acts wilfully done while so engaged, the company is liable. *The Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *The Indianapolis, etc., R. R. Co. v. Anthony*, 43 Ind. 183.

The motion to strike out part of the third paragraph of the complaint embraced the following part thereof:

"That portion of defendant's road which lies between Greencastle Junction and the depot of said defendant at or near the city of Greencastle, in said county, had long been and was then and there used with the license and assent of defendant as a way and road for foot passengers to pass and repass in and along said road between said Junction and said depot; and the said plaintiff on the day and year aforesaid was passing on said portion of said road, on foot, as he had been accustomed, and had a right to do, and the defendant well knowing the premises, on the day and year aforesaid."

We are not prepared to say that this language shows that the public had acquired a right of way over the track of the railroad company. But perhaps the allegation shows, taken

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altogether, that the plaintiff was not wrongfully on the railroad track, but was there by the leave and license of the defendant. At all events, the general rule established in this court is not to reverse a judgment because the inferior court has refused to strike out part of a pleading. It may be that no evidence was given under the allegation. If evidence was offered and admitted under such allegation, to the injury of the party, and the question was properly reserved, the court might then deem it a cause for a reversal of the judgment.

The remaining question is as to the correctness of the ruling of the court in refusing to grant a new trial. The first ground for a new trial is, that the court erred in giving charges numbered six, seven, eight, nine, ten, twelve, and seventeen. These instructions appear in the transcript, copied into the motion for a new trial. They are not in any bill of exceptions, nor are they signed by the judge. They appear to have been copied into the record by the clerk, of his own motion, in connection with the reasons for a new trial. This does not make them a part of the record. Instructions given must be in a bill of exceptions, or they must be signed by the judge. Otherwise, they are not properly any part of the record. This has been so often ruled that we deem it unnecessary to cite cases.

The next reason for a new trial is the refusal of the court to give instructions numbered one, two, six, seven, eight, nine, eleven, twelve, thirteen, fifteen, sixteen, seventeen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four. These instructions are also copied by the clerk in connection with the reasons for a new trial, but they are not in any bill of exceptions, nor are they signed by anybody, nor is it noted upon them by counsel that they were refused and excepted to. Hence these, like the other instructions, are not before us for any purpose.

The other reasons for a new trial question the sufficiency of the evidence to justify the verdict of the jury.

The facts of the case, so far as necessary to be stated, as given by the plaintiff himself in his testimony, are, that he

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started from the depot at Greencastle to walk on the track of the road to the Junction, a mile or so west of the depot. He knew that it was train time, and looked back several times ; did not see the train approaching, and heard no signal to warn him, although he thinks he heard the train come to the depot which he had just left. He was walking on the ends of the ties, on the north side of the track. He could see back nearly a quarter of a mile. The train was a passenger train, was running rapidly, and going west after the plaintiff. He did not observe the train until it struck him. The train stopped after striking him, took him into the baggage car, and took him back to Greencastle depot. His leg was broken.

The testimony of the other witnesses tends very strongly to show that the usual alarm was given by sounding the whistle and ringing the bell one hundred and fifty yards from the point at which the cars struck the plaintiff; that the plaintiff was in a deep study, and not attending to the approaching train ; that the brakes were used, and the ordinary efforts, by reversing the engine, made to arrest the train, and avoid running upon the plaintiff.

Several witnesses testified that the plaintiff said, immediately after the injuries, that he did not blame those in charge of the train ; and one testified that he said he was as much to blame as the servants of the company.

It appears from the evidence that it was common for persons to walk on that part of the track of the road.

We think there is little, if any, evidence of negligence on the part of the servants of the company. It cannot be expected that persons who may be on the track of a railroad, when a train is approaching, will remain until the train is upon them. It cannot be required of those managing trains that they shall stop the train whenever any one is seen on the track, especially at points where many persons are passing upon and crossing the same. The evidence shows no consent or license from the company to the use of its track as a way for travel by persons on foot. In our opinion, the

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plaintiff was so negligent in being upon the track of the road, under the circumstances, that he cannot recover against the company, even if the evidence showed negligence on the part of the company. To entitle him to recover on the ground of negligence, the plaintiff must have been free from negligence on his part contributing to the injury. *The Evansville and Crawfordsville R. R. Co. v. Lowdermilk, supra; The Indianapolis and Cincinnati R. R. Co. v. Rutherford, 29 Ind. 82.* There are many other cases in this court to the same effect.

The judgment is reversed, with costs, and the cause remanded for a new trial.

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PROMISSORY NOTE.—A promissory note payable in a bank in this State is negotiable; if not so payable, it is assignable, but it is not commercial paper.

ATTACHMENT.—*Garnishee.*—A party indebted to an attachment defendant by a note not negotiable may be garnished, although his note may not be due, and judgment may be rendered against him in favor of the attaching creditor, payable when the note becomes due. *The Junction R. R. Co. v. Cleneay, 13 Ind. 161,* is, on this point, overruled.

SAME.—A judgment cannot be taken against a garnishee, indebted by negotiable paper, unless it be shown that the note is past maturity and in the hands of the payee or not in the hands of a *bona fide* holder.

SAME.—*Judgment.*—When a garnishee answers that he is indebted by a non-negotiable note to the attachment defendant, and judgment is rendered against him, such judgment will protect him against a suit by a *bona fide* assignee of the note, if the garnishee had no notice of such assignment before the rendition of judgment against him in the attachment proceeding.

SAME.—*Non-Residence.*—*Publication.*—Where an attachment defendant is a non-resident, and is notified only by publication, he is before the court for all purposes except the rendition of a personal judgment; and a resident of this State indebted to him may be garnished, and a judgment rendered against the garnishee is a bar to a suit on such indebtedness, either by the attachment defendant or his assignee, although the judgment in garnishment may be unpaid.

From the Boone Circuit Court.

A. E. Gordon and W. B. Wills, for appellant.

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J. M. Rabb, A. J. Boone, and R. W. Harrison, for appellee.

BUSKIRK, J.—This was an action by the appellant against the appellee on a note and a mortgage given to secure its payment. The note was executed by the appellee to one Seth M. Moore, and by him assigned to one G. W. King, who assigned it to appellant. The note was as follows:

"Note \$1,000, Lebanon, Ind., November 13th, 1871.

"One year after date, I promise to pay to the order of Seth M. Moore one thousand dollars (\$1,000) with interest, at the rate of ten per cent. per annum after maturity; and with attorney's fee if suit be instituted on this note; and value received, without any relief whatever from the valuation and appraisal laws. The drawers and indorsers severally waive presentment for payment and notice of protest and non-payment of this note. DAVID M. VANCE."

The appellee answered as follows:

"David M. Vance, defendant herein, for answer to the plaintiff's complaint, says that he admits the execution of the note sued on in this cause, but says, that on the 9th day of December, 1871, Thomas C. Moore, administrator of the estate of Edward Moore, deceased, *et al.*, instituted a suit in the Boone Circuit Court against Seth M. Moore, the assignor of the note sued on, for twenty-five hundred dollars; that on the same day they procured an attachment against the goods and chattels of said Seth M. Moore, and also filed their affidavit that defendant Vance was indebted to said Seth M. Moore, the then defendant, on the same promissory note now in suit; that thereupon they procured a summons against the said Vance as garnishee, to appear at the next term of court and answer as to said indebtedness, and that said Vance was summoned as garnishee on the — day of —; and that at the next ensuing term of said Boone Circuit Court, to wit, the March term, 1872, of the Boone Circuit Court, said defendant answered to said summons of garnishment that he had executed to the said Seth M. Moore the note on which this suit is brought; and that he had no knowledge whatever of said Seth M. Moore having assigned or in any manner trans-

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fferred it; and that at said term of court, the said plaintiffs in said attachment suit recovered judgment against Seth M. Moore, and also a judgment against said defendant Vance, as garnishee, on the note now in suit, for the full amount of its principal and interest; copies of which are filed and made part hereof; and he, in fact, says that at all the times above stated he had no notice or knowledge of the assignment by Moore to the plaintiff or any other person of said note; wherefore," etc.

There was filed with the answer a full and complete copy of the proceedings and judgment in the attachment suit, from which it appears that proper affidavits in attachment and garnishment were filed, and that the defendant Seth M. Moore, who was shown to be a non-resident of this State, was duly notified of the pendency of said suit and proceedings by publication, and that an appearance was entered for the said Moore, but upon such appearance being withdrawn, he was called and defaulted.

To this answer a demurrer was overruled, and the appellant excepted.

The appellant then replied in two paragraphs. The first was the general denial. The second was as follows: "2d. Par. The plaintiff, for a second and further reply to the defendant's answer herein, says that he is a *bona fide* holder of said note for value, the same having been assigned to him before maturity, at Carroll's City, Carroll's County, Iowa, and that at the time judgment was rendered against the defendant as garnishee, the payee of said note," Seth M. Moore, "was a non-resident of the State of Indiana, and not before the court that rendered the judgment against the defendant as garnishee, and that the plaintiffs did not, at the time judgment was rendered against the defendant as garnishee, show to the court that said note was due and in the hands of the original payee, or if in the hands of a third person, that he held it fraudulently; wherefore," etc.

A demurrer was sustained to the second paragraph of the reply, and the appellant again excepted.

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There was a trial by the court, resulting in a finding for the appellee, and, over a motion for a new trial, judgment was rendered on the finding.

The errors assigned are: 1. In overruling the demurrer to the answer. 2. In sustaining the demurrer to the second paragraph of the reply. 3. In overruling the motion for a new trial.

The objection urged against the answer is, that it appears therefrom that the judgment against the garnishee was irregular and erroneous, in this, that the note was not due at the time of the rendition of the judgment, and that the payee thereof was at that time a resident of the State of Indiana. In support of this position we are referred to the cases of *The Junction Railroad Co. v. Cleneay*, 13 Ind. 161, *Cleneay v. The Junction Railroad Company*, 26 Ind. 375, and *Cadwalader v. Hartley*, 17 Ind. 520.

In the case first cited this court say: "A person indebted by an unnegotiable note, or a note not assignable by the law merchant, may be made liable as a garnishee after such note has become due and before it is assigned. But he can not be, before it becomes due (*Smith v. Blatchford*, 2 Ind. R. 184), nor after he has had notice of the assignment of the note, if he rely upon such notice in his answer." The case of *Smith v. Blatchford, supra*, does not support the proposition of law announced by the court. In that case, the note was governed by the law merchant, and the court held, when such a note was assigned before maturity, the assignee would be protected. In a subsequent part of the opinion in the case first cited, the court say: "It was said above, that the maker of a note could not be subject to a judgment as garnishee, before the note fell due. This assertion should be qualified to some extent. He may be, where all the parties are residents of the State, and before the court, so that the maker may be protected from a second liability; though he can not be compelled to pay till the note falls due. *Brisco v. Askey*, 12 Ind. R. 666." The case of *Brisco v. Askey, supra*, was a proceeding supplementary to execution, and had no relation to a

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proceeding in attachment and garnishment, and consequently had no application to the point then under examination. The learned judge who delivered the opinion of the court in the case under review was doubtless misled in his references to authorities, and in applying to a non-negotiable note the law applicable to a note governed by the law merchant.

The only point decided in *Cadwalader v. Hartley, supra*, was, that where a person summoned as a garnishee answers that he was indebted to the attachment defendant, but that before the service of the writ of garnishment, he was notified of the assignment of the note constituting such indebtedness, if the plaintiff desires to dispute such assignment for want of consideration or for fraud, it is proper, if not necessary, to bring the person claiming to hold as assignee before the court, so that he may be bound by the judgment; and on the trial of the issue thus formed, the attachment defendant would be a competent witness. We are unable to perceive the bearing of this case upon the one under examination. We think it has no application to the present case.

The case of *Cleeneay v. The Junction Railroad Co.*, 26 Ind. 375, is the same case, with the parties reversed, as the one reported in 13 Ind. *supra*. The court say: "By the statute, any person indebted to the attachment defendant may be garnished, and from the day of the service of the summons the garnishee is accountable to the attachment plaintiff for the amount due and owing from him to such defendant. 2 G. & H., secs. 175, 176, pp. 144, 145. Commercial paper is no exception to this rule. But in such case, before there can be a judgment rendered against the garnishee defendant, the plaintiff must show that the paper has matured, and that at the time of maturity it was held by the attachment defendant, or that it was not in the hands of a *bona fide* holder. This, we understand, is in accordance with the weight of authority. Drake Attachment, sec. 587, *et seq.*, and authorities cited."

The above case overrules the case as reported in 13 Ind.,

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supra, so far as it relates to notes not governed by the law merchant, and such ruling is in accordance with the statute. It is provided by section 183, 2 G. & H. 147, that "a garnishee in attachment shall not be compelled in any case to pay or perform any contract in any other manner, or at any other time, than he would be bound to do for the defendant in attachment." Why provide that the garnishee shall not be compelled to pay at any other time than he would have to pay to the attachment defendant, if he was only liable as a garnishee for such sum as was actually due at the time when the summons in garnishment was served upon him? We think the true meaning of the statute is, that any person who is indebted to a defendant in attachment, whether the debt is actually due or not, may be garnished, and that from the time of the service of the summons on him he shall be liable for the sum he then owes, and that in rendering judgment against him he shall be required to pay according to the terms of his contract. That is to say, that if his debt is due at the rendition of the judgment, he shall then be required to pay or replevy the judgment, but if the debt has, say six months to run, he shall be required to pay at the expiration of the six months.

Nor do we believe the principle announced in the above cited case in 13 Ind., that a judgment can only be rendered against a garnishee where all the parties are residents of the State, is correct. Where the defendant in attachment is a foreign corporation or a non-resident of the State, they may be brought in by publication; and when thus notified a defendant is before the court for all purposes except the rendition of a personal judgment. If the doctrine announced be correct, then a plaintiff in a foreign attachment could not proceed against a person indebted to the defendant, unless the debt was actually due. We do not think the statute will bear any such construction. The case of *The Junction Railroad Company v. Cleneay, supra*, is upon the point under examination overruled.

It is, in the next place, insisted that the answer was bad for

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failing to show that the judgment rendered against him as garnishee had been paid. There is nothing in the objection. It is well settled that the rendition of a judgment against a garnishee constitutes a valid defence to an action by the assignee of the note, if the judgment was rendered before the maker had notice of the assignment. *Covert v. Nelson*, 8 Blackf. 265; *Cornwell v. Hungate*, 1 Ind. 156; *Rooker v. Daniels*, 5 Ind. 519; *Shettler v. Thomas*, 16 Ind. 223; *Sckoppenhast v. Bollman*, 21 Ind. 280; *Richardson v. Hickman*, 22 Ind. 244. In the last two cases cited, the judgments against the garnissees had been paid, but the reasoning of the court shows that it was the judgment, and not its payment, which constituted the bar to another action on the note. If the court acquired jurisdiction in the attachment proceedings against the defendant, the judgment against the garnishee would protect him, although the judgment was irregular and erroneous. See the above cases.

In our opinion, the answer was good, and the action of the court in overruling the demurrer thereto was correct.

We proceed to inquire whether the court erred in sustaining the demurrer to the second paragraph of the reply. That paragraph was predicated upon the theory that the note sued on was governed by the law merchant. This is a mistake. It was not commercial paper. It was not an inland bill of exchange. It was not a note payable in a bank in this State. In this State a note not payable in a bank in this State is assignable, but is not commercial paper. This question was fully considered in the recent case of *Parkinson v. Finch*, 45 Ind. 122, where the adjudged cases in this court were reviewed. The reply might have been good if the note in suit had been commercial paper, as to which we decide nothing; but as it is not, it is bad, and the court committed no error in sustaining the demurrer to it.

Aside from the questions considered, the motion for a new trial presents no question for our decision.

The judgment is affirmed, with costs.

GASS ET AL. V. WILLIAMS ET AL.

ATTACHMENT.—*Delivery Bond.—Lien.*—The giving of a delivery bond in an attachment suit does not discharge the lien of the attachment.

SAME.—*Judgment in Attachment.*—A judgment against an attachment defendant, upon which an execution may issue on which the sheriff will be entitled to demand the goods specified in a delivery bond, must be a judgment in attachment.

SAME.—*Attachment Dissolved.—Delivery Bond.*—Where an attachment is dissolved, all the proceedings in attachment are quashed and become of no effect, and a delivery bond in such case falls with the writ on which it is based.

From the Marion Common Pleas.

E. T. Johnson, for appellants.

B. Harrison and *C. C. Hines*, for appellees.

BUSKIRK, J.—But one error is complained of in this action, and that is, that the court below erred in sustaining a demurrer to the substituted complaint.

The facts necessary to a proper understanding of the question involved are these:

On the 30th day of January, 1868, the appellants commenced an action against the Indianapolis Machine Brick Company, in the Marion Circuit Court, for the recovery of a debt.

At the time of filing the complaint, the appellants also obtained a writ of attachment, which the sheriff levied on certain personal property belonging to said company, and which was valued at four hundred and eighty dollars.

The defendant gave a delivery bond under section 168 of the code, 2 G. & H. 143, with Benjamin H. Williams and Tompkins A. Lewis sureties, and thereupon the property attached was returned by the sheriff to the defendant.

Afterward, the appellants obtained a personal judgment against the said company for three hundred and nine dollars and fifty-two cents. The attachment failed. No order for the sale of the attached property was made. The personal judgment remains unpaid. This action is based upon such delivery bond. The complaint, after reciting the foregoing

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ant will appear to the action, and will perform the judgment of the court, the attachment shall be discharged and restitution made of any property taken under it, or the proceeds thereof."

This court in *Dunn v. Crocker, supra*, in speaking of section 168, says: "The first of these two sections provides for an undertaking in the nature of a delivery bond, which does not release the property from the attachment, nor from an order of sale in the judgment."

The same learned judge, in speaking of section 172, on page 327, uses this language: "Under that section the written undertaking is a substituted security for the property, and where the attachment proceedings are sustained and judgment is rendered against the defendant, no order is made for the sale of the property, it having been released, but a suit on the undertaking is resorted to instead of the property. It is like the attachment proceedings against water craft."

A legislative construction of section 172 is contained in section 188, which is as follows:

"Sec. 188. Any defendant against whom an order of attachment has been issued may, after appearing to the action, move to have the attachment discharged and restitution awarded of any property taken under it; but an appearance to the action shall not operate to discharge the attachment, unless a written undertaking be filed as required in section 172. If the defendant appear and judgment be rendered in favor of the plaintiff, and any part thereof remain unsatisfied, after exhausting the property attached, such judgment shall be deemed a judgment against the defendant personally, and shall have the same effect as other judgments, and execution shall issue thereon accordingly, for the collection of such residue. If the plaintiff's undertaking be insufficient, he shall have a reasonable time to file an additional one." 2 G. & H. 148.

It is expressly provided in the above section, that there shall be no discharge of the attachment, unless a written undertaking be filed as required by section 172. By the

above section, it is provided that there shall be a judgment of sale of the attached property, and an execution over as on ordinary judgments for any amount not made by a sale of property. By the above section of the code, and by the practice obtaining here continuously ever since *Harlow v. Becktle*, 1 Blackf. 238, there is a special judgment or order of sale of attached property, and special execution. *The State v. Manly*, 15 Ind. 8; *Foster v. Dryfus*, 16 Ind. 158; *McCollum v. White*, 23 Ind. 43; *Perkins v. Bragg*, 29 Ind. 507; *Moore v. Jackson*, 35 Ind. 360.

The following extract from the brief of counsel for appellants meets with our approval :

"It will be seen that in the case provided for by section 172, the attachment is discharged, restitution of the property is made to the defendant, and thereafter there can be no issue in attachment to be determined. The attachment falls. But there is no such provision made under section 168. The attachment still exists. It becomes a triable issue under proper pleadings. The lien of the writ is not discharged. The court proceeds in the action as if no such bond had been given. The property is in the custody of the law. The bond is not a substituted security for the property. The property is to be returned to the sheriff. The effect of the bond is the same as that of a delivery bond where goods are levied upon under an ordinary execution. In such case no other execution can reach them. The lien of the levy continues. It was so held in *Hagan v. Lucas*, 10 Peters, 400. There slaves had been levied on by a sheriff under execution of the state court, and a delivery bond given. Subsequently, under writ from the United States Court, the marshal levied upon the same slaves. The Supreme Court of the United States held that the levy by the marshal could not be sustained, as the property was in the custody of the law, the first levy standing as a lien on the property. The case is, indeed, more than illustrative, and we invite the attention of the court to the report. An Alabama case is

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cited in the opinion of the court, where it was held that the giving of a bond for the delivery of property under the attachment laws of that state did not release the goods from the lien of the attachment. The principle upon which this decision is based is recognized in *Jagger v. Sterling*, 30 Ind. 341, where the act of a sheriff in levying upon property which had been theretofore attached, but taken from the custody of the sheriff upon a delivery bond, is termed 'unauthorized.' The property was not, by the delivery to the claimant or defendant, withdrawn from the custody of the law. In such case, to use the language of the court in *Hagan v. Lucas, supra*, 'the custody of the claimant is substituted for the custody of the sheriff' and 'the property is as free from the reach of other processes as it would have been in the hands of the sheriff.' In Drake on Attachments, section 331, it is said, upon the authority of the several cases there cited, that such bonds do not discharge the lien of the attachment.

"The statutes of Kentucky provide that the sheriff may deliver the attached property to the person in possession upon bond that the defendant shall perform the judgment of the court, or that the property or value shall be forthcoming. In *Bell v. Western, etc., Co.*, 3 Met. Ky. 559, the court say: 'In the one case the lien created by the attachment continues, and the power of the court subsists and continues as effectually for all purposes as if no bond had been given, or possession never passed from the officer. In the other case the lien is extinguished.'

"The provisions of the two sections of our statute are substantially the same as those of the Kentucky statute referred to, and the difference in the provisions of the two sections is accurately stated by the Kentucky Court of Appeals. This view receives further strength by the rulings of our own Supreme Court on the old water-craft-attachment law of 1838 and 1843, which held that where the prescribed bonds were given, the property was discharged, and

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the judgment personal against the claimant. *Lane v. Leet*, 2 Ind. 535."

The case of *Hardcastle v. Hickman*, 26 Missouri, 475, fully supports the second proposition laid down by counsel for appellees. There goods were attached and claimed by H. & F., and bond given to repossess the same, conditioned: Now if said obligees should fail to sustain their said suit so commenced by attachment as aforesaid, and obtain judgment against H. & F., as garnishees of M. & J. (who were the attachment defendants), and H. & F. shall, within thirty days, pay the amount of such judgment to obligees, this obligation to be void. It is understood that by judgment is meant final judgment, and that H. & F. will, in fulfilment of this obligation, pay any judgment which may be rendered in the attachment suit against M. & J. or H. & F. as garnishees. The court say: "The judgment spoken of in the bond, which was to fix the liability of the defendant, is a judgment in the suit by attachment—a judgment which would reach the property attached;" and it is expressly held, that where a judgment is spoken of as obtained in an attachment suit, it is clearly meant a judgment against the property in dispute, and not a general judgment in which the sureties could have no concern. The court adds: "Such a construction (as contended for) would make a party (surety) responsible for the debts altogether independent of the attachment." The same remark would apply in the case at bar.

Counsel for appellants refers us to the following authorities as supporting his views: *Young v. Campbell*, 5 Gilman, 80; *Love v. Voorhies*, 13 La. An. 549; *Guay v. Andrews*, 8 La. An. 141; *Waynant v. Dodson*, 12 Iowa, 22.

The case of *Young v. Campbell*, 5 Gilman, 80, cited by appellants, when viewed in connection with the statute and the practice in Illinois, upon which it was based, does not sustain the appellants' position. The practice in that and our own State is not similar. There a judgment *in personam* is sufficient, if there has been personal service. No order of

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sale of attached property is necessary. Nor are we informed in that case whether the attachment was maintained, or even contested. The case seems too meagre for an authority, and if an authority, is one only upon the question of practice in that State.

The case of *Love v. Voorhies*, 13 La. An. 549, cited by plaintiffs, to which we shall again refer upon another point, is expressly where property is released, and the case is clearly put upon that ground. The lien was gone. The measure of liability might well be the value of the attached property, and the bond held good, as under section 172 of our code. The Louisiana code, article 259, provides that the defendant, if he appear, may at any stage of the suit have the attached property released by delivering to the sheriff his obligation, etc., with surety, etc., that he will satisfy such judgment to the value of the property attached, as may be rendered against him in the suit pending.

In the above case there was personal judgment, an order of sale of attached property, execution and return of *nulla bona*. But the opinion of the court, adopting as its own the opinion prepared by the able judge then retired, says: "The case might be different if the attachment had been quashed by judicial order," citing *Pailhes v. Roux*, 14 La. 83, where the court say that this became necessary in order to relieve the party and his surety from the obligation resulting from the bond given to the sheriff, to regain possession of property attached. Is it not a legitimate inference from this language that a quashing or dissolution of the attachment relieves from the obligation of the bond?

The case cited from 8 La. An. 141, was under the same statute as above quoted, and is subject to the same criticism.

In *Waynant v. Dodson*, 12 Iowa, 22, cited at length by appellants, the decision was based upon a statute which provides for the discharge of the property. The case, in the light of the statute which we quote, cannot be considered as favoring the position of appellants. Section 3219, p. 591, Iowa Statutes (1860), is as follows:

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"The defendant * * may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, * * conditioned that such property, or its estimated value, shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof."

In our opinion, the three propositions laid down by counsel for appellees are fully supported by reason, and sustained by the authorities.

The consequences likely to result from the construction contended for by counsel for appellants are well stated in the following extract from the brief of counsel for appellees:

"And, upon principle, it seems evident that when the attachment is dismissed, or dissolved, or quashed, all its incidents fall with it. Does the lien of the writ continue when the writ is quashed? Would the officer have a right to hold attached property, after the dissolution of the attachment? If so, by what authority is it held? If he refused to deliver to the attachment defendant, could not the defendant maintain his suit against the officer for possession? Suppose a plaintiff procures a writ of attachment upon an affidavit of non-residence which is utterly untrue, and so known by the plaintiff at the time. The debtor's goods are levied on, and he gives a bond for their delivery to him. As soon as the bond is given, the plaintiff dismisses the attachment proceeding, but prosecutes his claim to final personal judgment. Is the attachment lien upon the goods to stand, and has the sheriff a right upon a general execution to demand them, and, delivery failing, can the plaintiff hold the bond procured by his intentional false swearing? The honest creditor must lose his debt, for, as shown under the head of our first proposition, his execution as against the lien of the attachment cannot have any force. We do not think the law was intended to aid false swearers, and give them advantages over honest creditors."

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In our opinion, the court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

46	255
125	45
46	252
145	28

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CONVEYANCE.—Condition Subsequent.—Town Plat.—County Seat.—Public Square.—The original plat of the town of Evansville was made in 1817, and at the bottom of the plat it was stated in writing that a certain block, through which two streets passed, "is reserved for a public square." Afterward, in 1818, the owners of the real estate thus platted proposed to the commissioners appointed to locate and fix the seat of justice for Vanderburgh county, that if they would fix the same in the town of Evansville, and have the square, designated on the plat as the public square, located as the square for the seat of justice, on which the public buildings should be erected, they would give as a donation, to and for the use of said county, said public square, together with other real estate, and convey the same, on the terms aforesaid, to such person as might be authorized to receive a conveyance; which proposition was accepted by said commissioners and the seat of justice established on said public square, and the jail and court-house erected thereon in 1818. Afterward, in 1819, the owners of the real estate thus platted conveyed to the agent for Vanderburgh county, for the use of Vanderburgh county, one-half of the public square thus designated on the plat, the deed of conveyance containing no conditions whatever. Afterward, in 1852, the Board of Commissioners of Vanderburgh County made an order directing the county agent to sell a part of said square, being a part upon which was located the jail, and in pursuance of such order the same was sold and conveyed.

Held, that the title of Vanderburgh county to the real estate was absolute, and free from any condition subsequent that it should be used for the erection of the public buildings of the county, and for no other purpose.

Held, also, that a corrected plat made ten years after the deed was made to the county agent could have no effect upon the title.

TOWN PLAT.—Reservation for Public Square.—A statement at the foot of a town plat that certain real estate contained therein is reserved for a public square does not indicate an intention to part with the property, but rather the opposite.

From the Posey Circuit Court.

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*J. E. McDonald and J. M. Butler, for appellants.
A. Iglehart, C. Baker, O. B. Hord, and A. W. Hendricks,
for appellees.*

DOWNEY, J.—This was an action by the appellants against the appellees, to recover certain real estate, being a part of what was the original public square as laid off in Evansville. The action was commenced in the Vanderburgh Circuit Court, but by change of venue was tried in the Posey Circuit Court. The defendants filed an answer consisting of a single special paragraph, in which they set forth their title at length. The plaintiffs replied to the answer specially. The defendants demurred to the reply. The demurrer was sustained by the court, and the plaintiffs declining to make any further reply, judgment was rendered in favor of the defendants. The appellants assign this ruling as error. They also assign as error the rendition of the judgment for the defendants, but this assignment amounts to nothing, as the rendition of judgment for the defendants must have been right, if the ruling on the demurrer to the reply was correct.

The complaint is in the ordinary form of complaints for the recovery of real property. It may be well to state in brief before setting out the facts in the answer, that the premises in controversy constitute a portion of one of four lots or squares of ground in the city of Evansville, and these four squares of ground were together designated on the original plat of Evansville as "the public square," although they were separated from each other by streets. Both parties claim title through and under James W. Jones and Robert M. Evans, two of the three proprietors of Evansville, by whom the town was laid out. The defendants claim title to the premises, under a conveyance from said Jones and Evans, and their wives, to the county agent of Vanderburgh county, and through a deed made by said agent, by direction of the board of commissioners of said county, to the appellees' grantor. The plaintiffs, as the heirs at law of the said James W. Jones and Robert M. Evans, claim the premises by descent. As the sole basis of their claim, the

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appellants insist that the four lots or squares of ground, designated on the plat of Evansville as the public square, were held by the county of Vanderburgh, upon and subject to a condition subsequent, which condition required said premises to be perpetually used for public or county purposes, and prevented the alienation thereof; that the sale and conveyance of a part of said public square, including the premises in controversy, by the county agent, by the direction of the board of commissioners, was a breach of said condition subsequent, which worked a forfeiture of the property, and gave the heirs of Jones and Evans a right to recover the premises by action against those who hold under the county agent's deed.

The allegations of the answer are as follows:

1. That the premises sought to be recovered consist of a part of the "public square" in the town of Evansville, in the county of Vanderburgh, and State of Indiana, as said square was laid off and designated on the original plan of the said town of Evansville, according to the plat of the original plan of said town as made, platted, and recorded by James W. Jones, Robert M. Evans, and Hugh McGary, in the year A. D. 1817.
2. That the said original plan of the said town of Evansville was laid off and is situated on fractional section No. 30, in township 6, south of range 10 west, in said county of Vanderburgh, and that Hugh McGary, one of the proprietors of said town, was, prior to and on the 20th day of November, A. D. 1817, the owner in fee simple of said entire section.
3. That prior to said 20th day of June, 1817, the said Hugh McGary had bargained and sold, and agreed to convey to the said James W. Jones and Robert M. Evans one hundred and thirty acres, part and parcel of said fractional section, and in anticipation of said conveyance, the said Jones, Evans, and McGary laid off the original plan of the town of Evansville on said fractional section, by which Main street of said town commenced at the Ohio River and extended back through

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the plat in a north-eastern direction, so as to separate the public square as laid down and designated in said plat by placing two blocks or quarters thereof below (or down the river) from Main street, and by which plat Third street of said town was made to pass through said plan at right angles to Main street, so as to leave one quarter or block of the upper half and one quarter or block of the lower half of said public square on each side of said Third street.

4. That after the said Jones, Evans, and McGary had made and signed said plat, but before the same was proved according to requirements of the statute so as to entitle it to be recorded, the said Hugh McGary and his wife, on the 20th day of June 1817, by their deed of that date conveyed to the said James W. Jones and Robert M. Evans the said one-hundred-and-thirty-acre tract before bargained and sold as aforesaid, the same being all that part of said fractional section, which was and is situated above or up the river from Main street according to the said plan and plat of said town, except thirty acres theretofore conveyed by said McGary to Carter Beaman, and that the premises so conveyed by said deed embraced and included the two blocks or quarters of said public square which were and are situated above Main street according to the said plat and plan of said town, and also embraced and included the real estate mentioned and described in the plaintiffs' complaint.

5. That after the making and delivery of said deed, on the 17th day of July, A. D. 1817, the said Jones, Evans, and McGary caused the previous execution of said plat to be proved before Louis Tackett, a justice of the peace of Warrick county, in the State of Indiana, said town of Evansville and said fractional section then being in said Warrick county, which proof was endorsed on said plat.

6. That within ten days from and after the said 17th day of July, 1817, the said plat was recorded in the recorder's office of Warrick county aforesaid, where it still remains of record.

On this plat the square is shown. Main street, sev-

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enty-six feet wide, running north and south, cuts the square into two parts, and Third street, sixty feet wide, running east and west, cuts each half into two parts. So that the square is really divided into four smaller squares. There were no words written upon the part of the plat representing the square to indicate that it was designed for any particular use. But in a writing at the foot of the plat this language is used: "The block through which Main street and Third street pass is reserved for a public square."

7. That afterward, on the 19th day of January, A. D. 1819, the said James W. Jones and his wife and the said Robert M. Evans and his wife made, executed, acknowledged, and delivered to Daniel Miller, who was then county agent of Vanderburgh county (said county then being organized and embracing said town of Evansville within its limits) their deed of conveyance of that date, whereby the said Jones and Evans and their wives, for the pecuniary consideration mentioned in said deed (\$500), conveyed to the said Daniel Miller, agent for Vanderburgh county, as aforesaid, and to his successors in office, for the use, benefit, and behoof of the county of Vanderburgh, among other parcels of real estate mentioned in said deed, that half of said public square as designated on said plat and mentioned in the explanatory memoranda endorsed thereon, which is situated above or up the river from Main street aforesaid, which deed included and conveyed the premises mentioned and described in the complaint, and sought to be recovered in this action.

8. That afterward, in the year 1852, the Board of Commissioners of Vanderburgh County, by their order duly entered of record, ordered and directed Thomas E. Garvin (who was then and there the county agent of said county, duly appointed and qualified and remote successor to said Daniel Miller in said office of county agent) to sell and convey that part of said public square which includes the premises mentioned and described in the plaintiffs' com-

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plaint. A copy of the said order of said board of commissioners is made a part of the answer.

9. That the said Thomas E. Garvin, as such county agent, in pursuance of said order, sold and conveyed that portion of said public square which embraces the premises mentioned in the complaint, to James Roquet, as appears by the deed of conveyance then executed and delivered by said agent to said Roquet, a copy of which deed is made part of the answer.

10. The title is here traced to the premises in question, by proper averments, from James Roquet to the defendants in this action; and it is averred that the defendants Pollard and De Bruler are the mere tenants of the defendant Garvin.

11. That in the year 1818 the county jail of said county was built on that portion of said public square, which includes the premises sought to be recovered, and that said jail was used as the county jail of said county, until said premises were so sold and conveyed by said county agent to said Roquet; and that the court-house of said county was erected in the year 1818 on the other quarter of the upper half of said square, and was used as the court-house of said county from the year 1818 to the year 1852, and that the premises mentioned in the complaint were sold for the purpose of erecting a new court-house on one of the quarters of the lower half of the said public square, and the proceeds applied to the erection of such new court-house, which is still used as the court-house of said county.

12. That said defendants claim title to said premises through and under the said deeds of conveyance hereinbefore stated and mentioned, and not otherwise; and that the defendant Garvin has for fifteen years been, and still is, in the exclusive occupancy and possession of said premises mentioned in the complaint, claiming to be the absolute owner in fee thereof, under the title before in this answer pleaded and mentioned, and that said defendants

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have no other title to said premises, except such as is so aforesaid pleaded and mentioned.

13. That the said James W. Jones died in the year 1840, and the said Robert M. Evans in the year 1843, and that the said plaintiffs have not, nor has either of them, any right, title, or claim to said premises in the complaint mentioned, or to any part thereof, except such as is derived by descent through, from, and under the said James W. Jones and Robert M. Evans, deceased.

14. That said plaintiffs claim said premises on the supposed grounds that Vanderburgh county held said premises under the facts hereinbefore stated and mentioned, upon condition that said "public square" should always be used for public or county purposes, and should never be sold or conveyed by the county or its agents, or diverted or applied to private uses, and that by the action of the board of county commissioners of said county, in ordering the sale and conveyance of said premises as aforesaid, and by the action of the said county agent in selling and conveying said premises as aforesaid, the said premises were forfeited, one-half to the heirs of said Jones, and the other half to the heirs of the said Evans.

15. The answer then expressly admits that a portion of the plaintiffs are the heirs of said Evans, and that another portion of said plaintiffs are the heirs of the said Jones, and that the plaintiffs together are the proper persons who as the heirs of the said Jones and Evans would have the right to take advantage of said supposed forfeiture, if such a forfeiture has occurred or exists, but the defendants insist, in concluding their answer, that no such forfeiture ever did or could exist under the facts thereinbefore pleaded and mentioned, and that by force and virtue of said facts so pleaded, the said defendant Garvin is the absolute owner in fee simple of the premises sought to be recovered. The answer concludes with the prayer that it may be taken as a cross complaint, and that defendants' title to the premises may be quieted, etc.

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The allegations of the reply are substantially as follows, viz.:

1. The reply admits that the real estate mentioned in the complaint constituted a part of the upper half of the public square in the town of Evansville, as the same was designated on the original plan of said town, as made by the said James W. Jones, Robert M. Evans, and Hugh McGary, and recorded in the year 1817.
2. That said plaintiffs also admit that the original plan of Evansville was laid off, and is situated, on fractional section No. 30, in township 6, south of range 10 west, in the county of Vanderburgh.
3. That Hugh McGary, one of the proprietors of said town, was, prior to and on the 20th day of June, A. D. 1817, the owner in fee simple of said entire section.
4. Plaintiffs also admit that on the 20th day of June, 1817, the said Hugh McGary, by his deed of that date, in the execution of which his wife joined, conveyed to the said James W. Jones and Robert M. Evans one hundred and thirty acres, part and parcel of said fractional section; but plaintiffs say that as to any agreement between the said McGary and the said Jones and Evans prior to the said 20th day of June, 1817, whereby the said McGary bargained and sold and agreed to convey to the said Jones and Evans the one hundred and thirty acres, plaintiffs have no knowledge, and deny that there was any such agreement.
5. The plaintiffs also admit that the said one hundred and thirty acres so conveyed was all that part of said fractional section which was and is situated above (or up the river from) the center of Main street, according to said plan of said town, except thirty acres theretofore conveyed by said McGary to Carter Beaman, the said one hundred and thirty acres embracing the two blocks or quarters of said public square, which were situated above the said Main street, within which is situated the real estate mentioned and described in the complaint.
6. The plaintiffs also admit that after the making of said

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deed, and on the 17th day of July, A. D. 1817, the original plan of said town of Evansville, as made by the said McGary, Jones, and Evans as aforesaid, was acknowledged by the said Hugh McGary and Robert M. Evans before one Louis Tackett, a justice of the peace of Warrick county, within which county the said fractional section then was; but the plaintiffs say that said plan was never proved or acknowledged by the said James W. Jones as required by law, and that as to when said plat or plan of the said town of Evansville was made, the plaintiffs have no knowledge, but believe and aver that the same was made subsequent to the said 20th day of July, 1817; neither do the plaintiffs admit or deny the allegations of the defendants as to when said plat or plan was recorded, they having no knowledge thereof.

7. Plaintiffs admit that on the 9th day of January, 1819, the said James W. Jones and his wife, and the said Robert M. Evans and his wife, executed and delivered to Daniel Miller (who was then county agent of Vanderburgh county) their deed of conveyance as is alleged in defendants' answer; but plaintiffs say that the said deed was not a conveyance absolute to the said Miller as such agent, but was a conveyance upon the condition that the portion of said public square so conveyed by said Jones and Evans to the said Miller should be used by the county of Vanderburgh for the purpose of erecting thereon the public buildings of the county, and for no other purpose whatever, as appears from the following facts which plaintiffs aver to be true:

8. That prior to the year 1818, to wit, in the year —, the General Assembly of the State of Indiana passed an act creating the county of Vanderburgh, and subsequently, in pursuance of law, appointed commissioners to locate and fix the permanent seat of justice for said county; and that according to the provisions of the statute regulating their proceedings and defining their duties, said commissioners met for the purpose of receiving proposals from persons owning lands in said county and offering donations in land for

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the use of the same, and received from the proprietors of Evansville, to wit, McGary, Jones, and Evans aforesaid, on the 11th day of March, 1818, a proposition in writing that if they (the said commissioners) would fix the seat of justice for Vanderburgh county in the town of Evansville, and have the square which had been designated as the public square, in the plat of said town, located as the public square of the said seat of justice, on which the public buildings should be erected, they (the said proprietors) would give, as a donation to and for the use of said county, one hundred lots, including said public square, which they would convey on the terms aforesaid, to such person as might be authorized to receive the conveyance.

The language of this offer so far as material is this:

"Provided you shall feel disposed to fix the seat of justice for the county of Vanderburgh in the town of Evansville, and have the square, which has been designated as the public square on the plat of said town, located as the public square for the said seat of justice, on which the public buildings shall be erected, we propose to give as a donation, to and for the use of said county, one hundred lots including said public square; that is, the lots included in said square, with the streets and alleys appertaining thereto, according to the plan of said town, as a donation for the use and benefit of said county of Vanderburgh, which we will convey, on the terms aforesaid, to such person as may be authorized to receive a conveyance for the same, for the purpose aforesaid."

9. The reply further states that on the said 11th day of March, 1818, the said commissioners made their report according to law to the county commissioners of said county, in which they say that they have determined on fixing the permanent seat of justice for said county on the square designated as the public square on the plan of the town of Evansville; and that the proprietors of said town have proposed to give, as a donation to the use of said county, one hundred lots, including the public square, agreeably to the

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plan of said town; and that they had accepted the proposition and fixed and established the permanent seat of justice of said county on said public square.

10. The reply then states that in pursuance of the statute regulating the fixing of the seats of justice in all new counties, the said Hugh McGary, James W. Jones, and Robert M. Evans executed a bond, in the penal sum of twenty thousand dollars, conditioned that, whereas the commissioners had selected the square in the town of Evansville, known as the public square, in consideration of the establishment of the seat of justice on said square, and in consideration of the erection of the public buildings thereon, they bound themselves to convey to the person authorized to receive it, by title in fee simple, a sufficient quantity of land lying north-easterly of said square to make one hundred lots, and to pay to the treasurer of said county six hundred dollars in cash or material; a copy of which bond is made a part of the reply.

11. And that in pursuance of said proposition and bond, and in order to meet the requirements of the statute aforesaid, touching the fixing of county-seats in new counties, the said Jones and Evans, and their wives, executed on the 9th day of January, 1819, the said deed to Daniel Miller, agent of said county, as is alleged in the answer, and for no other consideration whatever.

12. That afterward, on the 19th day of October, 1830, in pursuance of an act entitled "an act for recording town plats, approved January 21st, 1818, two of the proprietors of said town of Evansville, to wit, James W. Jones and Robert M. Evans, made and executed and acknowledged according to law a corrected plat of the said town of Evansville and endorsed thereon a declaration of the purpose and object of the grant made to the county of four blocks marked and known as the public square, whereby they declare that the said four blocks were granted or intended to be granted to the public as a permanent donation, and whereon to erect public buildings for public purposes, but never in

any event to be converted to private uses. A copy of this corrected plat is made a part of the reply.

13. It is admitted that the Board of Commissioners of Vanderburgh County, in the year 1852, made the order directing the county agent to sell that part of said public square which includes the premises mentioned and described in the complaint, and that the same was sold and conveyed by the county agent to James Roquet, as is alleged in defendants' answer.

14. It is also admitted that Roquet conveyed the premises in controversy to Garvin, and that the same have been held and claimed by him as is alleged in the answer.

15. It is also admitted that the plaintiffs claim as the heirs at law of said Jones and Evans, and not otherwise; and the plaintiffs say that said conveyance by said Jones and Evans to the said Daniel Miller was upon a condition subsequent, and that by reason of the sale of the property mentioned by the county of Vanderburgh to the said James Roquet, said condition was broken and said real estate reverted to the plaintiffs; wherefore judgment is demanded in accordance with the prayer of the complaint.

As the deed from Jones and Evans to the county agent is the most important instrument in the chain of title, so far as the question to be decided is concerned, we copy it except immaterial parts:

"This indenture, made the 9th day of January, in the year of our lord one thousand eight hundred and nineteen, between James W. Jones and Elizabeth, his wife, Robert M. Evans and Jane, his wife, of Gibson county, and State of Indiana, of the one part, and Daniel Miller, agent for Vanderburgh county, or his successors in office, of the other part, witnesseth; that the said James and Elizabeth, Robert and Jane, for and in consideration of the sum of five hundred dollars good and lawful money of the United States, to the said James W. Jones and Elizabeth, his wife, Robert M. Evans and Jane, his wife, in hand paid by the said Daniel

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Miller, as agent aforesaid, at or before the sealing and delivering hereof, the receipt whereof they and each of them doth hereby acknowledge, and him, the said agent, and his successors in office, his and their heirs and assigns thereof, forever exonerate and discharge, hath each of them given, granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents do each give, grant, bargain and sell, alien, release, convey and confirm unto the said agent or his successors in office forever, to and for the sole use, behoof, and benefit of the said county of Vanderburgh, the several lots or parcels of ground following, to wit: Half the lot or square of ground designated in the town of Evansville as the public square, containing about two acres and twelve poles, exclusive of the streets which pass through the said square and the alleys which surround the same, the part hereby conveyed being the upper or southeastern half of said square, and also the following lots in what is called the donation enlargement of Evansville, to wit:" (Here the numbers are given.) "Together with all and singular, the rights, members, and appurtenances thereunto belonging, or any wise appertaining, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, either in law or in equity, or otherwise howsoever, in the said James W. Jones and Elizabeth Jones, his wife, Robert M. Evans and Jane, his wife, of, in, or to the said several lots or parcels of ground and every part and parcel thereof, with the appurtenances.

"To have and to hold the said several lots and parcels of ground above described, bargained, and sold, and every part and parcel thereof, with the appurtenances, to the said agent and his successors in office, to his own proper use and behoof forever, and the said James W. Jones and Elizabeth, his wife, Robert M. Evans and Jane, his wife, for themselves and their heirs, executors, and administrators, the said several lots of ground above described, and every part and parcel thereof, with the appurtenances, to the said agent and his successors in office, his and their heirs and assigns forever, against the

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legal claim or claims of all and every person or persons whatsoever, the said James W. Jones and Elizabeth, his wife, Robert M. Evans and Jane, his wife, shall and will warrant and forever defend by these presents.

"In witness," etc.

The learned counsel for the appellants contend, in their brief, as may also be inferred from the allegations of the reply, that by the various steps taken in platting the town site of Evansville, and in the donation and conveyance of the square to the county, the county became the owner of the square in fee simple, subject to a condition subsequent that the square should never be used for any other purpose than a site for the public buildings of the county; that the county, by selling the part of the square in question, and allowing its use for purposes other than those intended by the donors or grantors, has violated this condition and authorized the appellants, the heirs of the donors or grantors, to recover the ground in this action.

In support of the position that there was a conveyance on condition here, counsel refer to *Scott v. Stipe*, 12 Ind. 74. The deed in question in that case is not set out in the opinion. But the court in the opinion say :

"But the grant in this case was not only in trust; it was also upon a condition subsequent that the church should, within a reasonable time, be erected upon the lot, and forever thereafter be used as a house of worship, pursuant to the intention of the grantor."

A church had been erected on the lot and used for a time, and then the lot and church sold to the appellee, and was used by him for a store-room and for other business of a secular character. In the case under consideration, there was no condition either in form or substance in the plat, the proposition to donate, or in the deed. The donors or grantors stipulated for the location of the county-seat at Evansville, and that the public buildings should be erected on the square. This was done; and when they had secured this, they conveyed

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ground unconditionally to the county agent by the deed which we have copied. Their proposition was :

" Provided you shall feel disposed to fix the seat of justice for the county of Vanderburgh in the town of Evansville, and have the square, which has been designated as the public square on the plat of said town, located as the public square for the said seat of justice, on which the public buildings shall be erected, we propose to give as a donation, to and for the use of said county, one hundred lots including said public square, that is, the lots included in said square with the streets and alleys appertaining thereto, according to the plan of said town, as a donation, for the use and benefit of said county of Vanderburgh, which we will convey, on the terms aforesaid, to such person as may be authorized to receive a conveyance for the same, for the purpose aforesaid."

This proposition was accepted by the commissioners to locate the county-seat, to whom it was made, on the 11th day of March, 1818. The deed was executed on the 9th day of January, 1819.

It is quite clear to us that the case cited is not an authority on which the question under consideration can be decided for the appellants. It is different from this, in that there was in that case a condition in the deed, while here there is none.

The statement at the foot of the plat that the ground was "reserved for a public square" does not indicate an intention by that act to part with the title to the property, but rather the opposite. See, on this subject, *Westfall v. Hunt*, 8 Ind. 174.

The proposition to the commissioners to locate the county-seat, and their acceptance thereof, formed a contract in accordance with the terms of the proposition. This contract was fulfilled, or its performance secured to the grantors or donors, before the date of the deed, so that when they made it they inserted no reservation or condition, but made

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their conveyance absolute and unconditional. The contract was thus completely fulfilled and merged in the deed.

We are unable to see any ground on which the title of the county to the ground in question can be regarded as upon a condition. See, on this subject, *Hunt v. Beeson*, 18 Ind. 380; *Thompson v. Thompson*, 9 Ind. 323; *Packard v. Ames*, 16 Gray, 327; *Rawson v. Inhabitants, etc., of Uxbridge*, 7 Allen, 125; *Ayer v. Emery*, 14 Allen, 67; *Heaston v. The Board of Commissioners of Randolph County*, 20 Ind. 402.

We cannot discover any bearing which the corrected plat of Evansville can have on the question. This correction in the plat of the city was made more than ten years after the deed was made under which the county held the land in question.

The judgment is affirmed, with costs.

**THE LOUISVILLE, NEW ALBANY, AND CHICAGO RAILROAD CO.
v. CAUBLE.**

RAILROAD.—Animal Killed.—Receiver.—Service of Process.—A railroad company is liable to an action, under the statute, for killing stock while the road is being run, operated, and controlled by a receiver appointed by the circuit court of the United States; and service of process in such case upon a conductor of a train passing through the county where the animal was killed is sufficient, though the conductor be employed and controlled by such receiver.

From the Washington Circuit Court.

W. F. Hammond, J. M. Judah, and G. H. Chapman, for appellant.

BUSKIRK, J.—This was an action by the appellee against the appellant, to recover the value of a cow alleged to have been killed by the locomotive and cars of the appellant.

The only question presented for our decision is, whether

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the court below possessed jurisdiction of the subject-matter of the action and of the appellant.

It appears of record, that George H. Chapman, receiver of the Louisville, New Albany, and Chicago Railroad Company, appointed by the Circuit Court of the United States for the district of Indiana, entered a special appearance in the justice's court, from which this cause was appealed to the court below, and filed a sworn answer, going to the jurisdiction of the justice's court, and alleging that said railroad company is, and was, at and before the time of the killing of the stock complained of, within the exclusive jurisdiction, custody, and control of the said United States Circuit Court, and that by an order of said court, at the November term thereof, A. D. 1870, before the killing of the stock complained of, all of the rights, property, etc., of said railroad company were placed in his hands as receiver of said court, duly appointed, etc., and setting forth a duly certified copy of the decretal order of said court; that he also filed along with said answer an affidavit showing that the only process had in said cause was served upon a conductor who was, at the time of such service, in the employ of himself, as the receiver of the said railroad, and not in the employ of the said railroad company.

It further appears that while this cause was pending in the court below, the said George H. Chapman, as such receiver as aforesaid, entered a special appearance and moved to dismiss the action upon the grounds and for the reasons assigned in the justice's court, namely: The Circuit Court of the United States having the exclusive jurisdiction, custody, and control of the line of road, locomotives, cars, rights, credits, property, and franchises of the said railroad company, and the same being in the hands of the receiver of the said court, and the service of process in said cause being made upon a conductor who was the agent and employee of the said receiver, and not of the defendant sought to be charged with liability in said suit.

The motion was overruled, and this ruling is assigned for

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error, and presents for decision two questions. The first is, whether the appellant is liable to an action, under the statute, for killing stock while it was being run, operated, and controlled by a receiver appointed by the Circuit Court of the United States for the district of Indiana. The second is, whether the service of process upon a conductor of a train passing into or through the county where the animal was killed, which conductor was employed by and under the control of such receiver, was proper and sufficient.

By the first section of the act of March 4th, 1863, 3 Ind. Stat. 413, it is provided, "that lessees, assignees, receivers, and other persons, running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotive, cars, or other carriages of such company, to the extent and according to the provisions of this act."

By the above quoted section, lessees, assignees, receivers, or other persons running or controlling any railroad company in the corporate name of such company are made liable either jointly with the railroad company or severally, that is, without the company being joined with them, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of such act.

By the second section of such act, it is provided in express terms that such action may be brought against the railroad, whether the same was being run by the company, or by a lessee, assignee, receiver, or other person in the name of the company.

The question discussed by counsel for appellant therefore resolves itself into the question of whether the legislature of this State possessed the constitutional power to pass the above recited act. The corporate existence, powers, and franchises of the appellant were conferred by the legislature of this State. We have carefully examined the decree of the United States Circuit Court for the District of Indiana, appointing Mr. Chapman receiver, and find nothing therein

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which attempts to take away the corporate existence, powers, or franchises of the appellant, and it is therefore unnecessary for us to express any opinion as to the power of the federal judiciary to decree a forfeiture of the corporate existence and franchises of a corporation created by a sovereign State. The whole decree proceeds upon the theory that the appellant is a corporation created and existing under the laws of this State. The whole effect of the decree is, to take the custody, control, and management of such corporation out of the hands of the persons who were controlling and managing the same and to place the same into the custody and under the control and management of the receiver for a specified time and for a special purpose. The corporate existence of the appellant was left intact. The corporate powers and franchises which had been exercised by the officers of the company were conferred for the time being upon the receiver. The power and authority of the receiver to manage and control the company and its operations depended upon its corporate existence. If that had been taken away, the power and authority of the receiver would have ceased and terminated, for no court, federal or state, can confer corporate powers and franchises upon an individual. Such powers can be created and conferred by the legislative department alone.

It has been so repeatedly held by this court that the legislature possessed full and ample power to pass the original and amendatory acts, that the question cannot be regarded as open to discussion. *The Madison and Indianapolis Railroad Co. v. Whiteneck*, 8 Ind. 217; *Madison and Indianapolis Railroad Co. v. Herod*, 10 Ind. 2; *The Indianapolis and Cincinnati Railroad Co. v. Townsend*, 10 Ind. 38; *The New Albany, etc., Railroad Co. v. Tilton*, 12 Ind. 3; *The New Albany, etc., Railroad Co. v. Maiden*, 12 Ind. 10; *The New Albany, etc., Railroad Co. v. Pace*, 13 Ind. 411; *Wright v. Gossett*, 15 Ind. 119; *The Terre Haute, etc., Railroad Co. v. Smith*, 16 Ind. 102; *The Toledo, etc., Railroad Co. v. Brown*, 17 Ind. 353; *The Ohio and Mississippi Railroad Co. v. Fitch*,

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20 Ind. 499; *McKinney v. The Ohio and Mississippi Railroad Co.*, 22 Ind. 99; *The Indianapolis and Cincinnati Railroad Co. v. McKinney*, 24 Ind. 283; *The Indianapolis, etc., Railroad Co. v. Petty*, 25 Ind. 413; *The Indianapolis, etc., Railroad Co. v. Irish*, 26 Ind. 268; *The Indianapolis, etc., Railroad Co. v. Parker*, 29 Ind. 471; *The Jeffersonville, etc., Railroad Co. v. Chenoweth*, 30 Ind. 366; *The Jeffersonville, etc., Railroad Co. v. Parkhurst*, 34 Ind. 501; *The Indianapolis, etc., Railroad Co. v. Warner*, 35 Ind. 515; *The Indianapolis, etc., Railroad Co. v. Johnson*, 36 Ind. 267; *The Jeffersonville, etc., Railroad Co. v. Ross*, 37 Ind. 545; *The Jeffersonville, etc., Railroad Co. v. Sullivan*, 38 Ind. 262; *The Cincinnati, etc., Railroad Co. v. Townsend*, 39 Ind. 38; *The Jeffersonville, etc., Railroad Co. v. Underhill*, 40 Ind. 229; *The Ohio and Mississippi Railway Co. v. Cole*, 41 Ind. 331; *The Cleveland, etc., Railroad Co. v. Swift*, 42 Ind. 119; *The Indianapolis and St. Louis Railroad Co. v. Christy*, 43 Ind. 143.

The foregoing constitute a few of the many cases in this court in which the validity of the acts under examination has either been expressly declared or recognized and acted upon as valid and constitutional.

But the question remains to be considered whether the summons was properly served. It was served upon a conductor on a train which passed into and through the county where the cow was killed. The second section of the act of March 4th, 1863, provides, that "the owner thereof may go before some justice of the peace of the county in which such killing or injuring occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company, by the service of a summons by copy on any conductor of any train passing into or through said county."

The service of process in this case was in strict conformity to the statute. The action is against the railroad company, and not the receiver. If the action were against a lessee, assignee, receiver, or other person named in the first

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section of the act, a very different and grave question would be presented for our decision.

The court below, in our opinion, committed no error in overruling the motion to dismiss the action.

The judgment is affirmed, with costs.

KELLENBERGER *v.* PERRIN ET AL.

PRACTICE.—*Default.*—It is error to enter a default and render judgment against a defendant who has demurred to the complaint, while his demurser remains undisposed of.

RECORD.—*Nunc pro tunc Entry.*—Where by a *nunc pro tunc* entry in the court below, certified to the Supreme Court on a *certiorari*, it is shown that an error appearing in the record originally sent up was not in fact committed, the record stands as though such error had never appeared.

MOTION.—*Affidavits.*—Affidavits filed in opposition to a motion to correct the record of an inferior court are not properly a part of the record on appeal, unless made so by a bill of exceptions.

From the Warren Common Pleas.

W. C. Wilson and F. H. Adams, for appellant.

R. C. Gregory, F. R. Coffroth, and R. P. Davidson, for appellees.

BUSKIRK, J.—This was an action by the appellees against the appellant and William Royal, on a promissory note. The action was commenced in the Tippecanoe Common Pleas. At the first term of the court, the defendants appeared and filed a demurrer to the complaint. The appellees then amended their complaint, whereupon the defendants re-filed their demurrer thereto. A change of venue was then taken to the Warren Common Pleas, and, without closing the issues, the cause was transferred. At the two succeeding terms of the Warren Common Pleas, the cause was continued by the agreement of the parties. At the February term, 1873, and on the second day thereof, the cause being set for the third

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day, the appellant was called and defaulted, and judgment rendered against him for failing to appear and plead. And a rule was entered against Royal to answer the complaint by two o'clock of that day, and for failure to comply with such rule, judgment was rendered against him. Kellenberger alone appeals. Royal was notified of such appeal, but he has not appeared and declined to join in the appeal.

At the time the appellant was defaulted, the appearance which had been entered for him had not been withdrawn, and his demurrer to the complaint was standing undisposed of. No rule to plead could be entered against him, while an issue of law was pending, undisposed of. The appellant was not in default at the time he was called and defaulted. He had appeared and demurred to the complaint. The demurrer was undecided. His appearance had not been withdrawn. The judgment by default was irregular and erroneous. *Ellison v. Nickols*, 1 Ind. 477; *Carver v. Williams*, 10 Ind. 267; *Sloan v. Witthbank*, 12 Ind. 444; *Woodward v. Wous*, 18 Ind. 296; *Norris v. Dodge's Adm'r*, 23 Ind. 180; *Wright v. Howell*, 24 Iowa, 150; *Rollins v. Coggshall*, 29 Iowa, 510.

But by the return to a *certiorari* awarded by this court, it appears that the record in this cause was, upon motion and notice at the February term, 1874, amended so as to show that the appearance which was entered in the Tippecanoe Common Pleas was for William Royal, and that the demurrer was filed by and for said Royal alone. The record as amended, then, shows that the appellant failed to appear and plead. The default was therefore correctly entered, and no attempt has been made in the court below to have it set aside.

It appears from the amended record, that the appellant appeared and resisted the application to correct the record so as to show that he had not appeared and demurred to the complaint, and that he excepted to the judgment of the court ordering the *nunc pro tunc* entry; and that thirty days time was granted him in which to prepare and file a bill of

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exceptions. But it does not appear that any bill of exceptions was filed. The clerk has copied into the amended transcript what purport to be numerous affidavits, which he says were read upon the hearing of such motion, but this does not make them a part of the record. *Kesler v. Myers*, 41 Ind. 543.

The *nunc pro tunc* order, therefore, stands without anything in the record to impeach it, or to present any question for our decision in relation thereto. The record then stands as though it had never showed an appearance for, and the filing of a demurrer by, the appellant. *Bush v. Bush*, ante, p. 70.

The judgment is affirmed, with costs.

46	284
124	356
46	284
139	629

FLANDERS v. O'BRIEN.

MISTAKE.—Mortgage.—Judgment Creditor of Mortgagor.—A mortgagee cannot have his mortgage reformed and corrected on the ground of a mistake in describing the real estate, so as to make the mortgage cover another and different tract of land than that described therein, as against a judgment creditor who has purchased in good faith, for a valuable consideration, judgments rendered against the mortgagor after the execution of the mortgage.

From the Hamilton Common Pleas.

D. Moss and F. M. Trissal, for appellant.

W. O'Brien, R. Graham, J. E. McDonald, J. M. Butler, F. B. McDonald, and *G. C. Butler*, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellant and others, to reform a mortgage executed by one James O'Brien to the plaintiff, and to foreclose the same. There are three tracts of land mentioned in the mortgage, one of which is the south-east quarter of a designated section, and it is alleged that the south-west quarter of the section was intended. The appellant was made a defendant, because he was the owner, by assignment, of several judg-

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ments which had been rendered against the mortgagor after the execution of the mortgage. The only question in the case is, whether the mistake can be corrected as against the appellant, as the holder of such judgment incumbrances, he having purchased the same for a valuable consideration, and taken an assignment of them without any notice of the mistake in the mortgage, or that it was intended to include the omitted land.

Upon a former consideration of the case, we concluded that the mistake could be corrected as against him. We so held on the authority of *White v. Wilson*, 6 Blackf. 448, and *Sample v. Rowe*, 24 Ind. 208. On application of appellant, and upon further consideration, we granted a rehearing. The case is now again before us for a final decision.

As between a mortgagee and a judgment plaintiff, it seems settled by the cases to which we have referred, that a mistake in the description of the land intended to be mortgaged may be corrected at the instance of the mortgagee, his mortgage being older than the judgment. It was said in the first named case, "that, in all cases of mistake in written instruments, courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts."

The equity in favor of the mortgagee in such cases may be stronger than that in favor of the judgment plaintiff. The judgment plaintiff has not, probably, parted with his money on the faith of the apparent facts. But where the judgment has been sold and assigned to one ignorant of the mistake in the mortgage, and who has expended his money upon the faith of the rights of the parties, as they appear in the respective securities, it is difficult to see any superior equity in the mortgagee. Such purchaser of the judgment has acted upon the apparent facts of the case, as the parties have allowed them to exist. It is their fault if the papers do not speak the truth, and it may be unjust that their mistakes

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should be cured to his injury, who has been misled by their failure to attend carefully to their own business.

Upon the best consideration which we have been able to give the question, we have come to the conclusion that the mortgagée in such case, where the judgment has been assigned to, and is held by, one who purchased it in good faith, without notice, and for a valuable consideration, has no superior equity, and no right to have the mortgage reformed, and the mistake corrected. The doctrine of the cases cited is not so clearly equitable as to warrant its extension or application to cases not coming clearly within the rule.

The judgment, as to the appellant, is reversed, with costs, and the cause remanded, for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

[46 286
140 228]

BARTHOLOMEW *v.* PRESTON.

PRACTICE.—Assignment of Error.—Superior Court.—An appeal from a special term to the general term of a superior court, so far as the assignment of error is concerned, is governed by the same rules that govern in appeals from the circuit courts to the Supreme Court.

SAME.—New Trial.—To repeat the reasons contained in a motion for a new trial as assignments of error, without assigning the overruling of the motion for a new trial as error, presents no question for review.

From the Marion Superior Court.

P. W. Bartholomew, for appellant.

J. B. Julian, D. M. Bradbury, and J. F. Julian, for appellee.

DOWNEY, J.—This was a suit by the appellee against the appellant, on a promissory note, which was made, was payable, and was indorsed in the State of New York.

Issues were formed in the special term; there was a trial

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by the court, a finding for the plaintiff, a motion by the defendant for a new trial overruled, and final judgment for the plaintiff. On appeal by the defendant to the general term, he assigned errors as follows: "The appellant assigns the following errors as causes why the judgment at special term should be reversed:

" 1. The court at special term erred in admitting the entire deposition of J. Bower Preston to be read in evidence by the appellee on the trial of this cause, the same not being admissible under the issues as made in this case. 2. The court at special term erred in admitting in evidence question number eight and answer thereto, in the deposition of J. Bower Preston, the same not being admissible under the issues formed in this cause and improper and incompetent. 3. The court at special term erred in admitting in evidence the deposition of Charles Anthony, the same being improper and incompetent, and not admissible under the issues as made in this cause below. 4. The court at special term erred in admitting in evidence the certificate of ex-Secretary of State of Indiana James S. Athon, dated March 1863, to prove a present law, and for the reason the same is not properly made out and certified. 5. The court at special term erred in finding for the plaintiff and against the defendant. 6. The court below erred in rendering judgment for plaintiff and against appellant, the same being contrary to law. 7. The judgment of the court at special term is not sustained by sufficient evidence to support it. 8. The court at special term erred in allowing appellee to prove by depositions the law of New York upon commercial paper and the common law of New York, under the first paragraph of plaintiff's complaint. 9. The court at special term erred in allowing the plaintiff to prove, by depositions of plaintiff and Charles Anthony, the law merchant of New York, under the allegations of the first and second paragraphs of plaintiff's complaint. 10. The court at special term erred in refusing to suppress the depositions of plaintiff below and Charles Anthony, upon appellant's motion. 11.

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The court at special term erred in refusing the appellant's motion and overruling said motion of defendant to strike out the eighth question and answer thereto in plaintiff Preston's deposition on the trial below. 12. The court at special term erred in refusing and overruling defendant's motion below to strike out the following part of plaintiff's second paragraph of complaint from the word 'is' in line fifteen, including lines sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one, as surplusage, and in admitting the same as evidence in said cause below."

Upon consideration of these alleged errors, the court in general term affirmed the judgment of the special term. The defendant then appealed to this court, where he has assigned as error, that "the court below in general term erred in affirming the judgment of the court below in special term."

We are of the opinion that there was no question presented to the superior court in general term for its decision. An appeal from a special to the general term of that court, so far as the assignment of the errors is concerned, should be governed by the same rules which govern in appeals from the circuit courts to this court. Acts 1871, p. 53, secs. 25 and 26; *Wesley v. Milford*, 41 Ind. 413; *Carney v. Street*, 41 Ind. 396. There is no other law to govern the same, and uniformity of practice is an argument in its favor. To repeat the reasons for a new trial as assignments of error, without alleging as error the overruling of the motion for a new trial, has never been regarded in this court as a proper assignment of errors. A reference to cases on this subject is unnecessary. That the superior court in general term considered and decided the questions thus assigned, is no reason why we should do so. The attention of that court was probably not called to the question. The objection is not made here by counsel, but we feel bound, in favor of a proper practice in such cases, to apply the rule, without any sug-

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gestion of it by counsel. In *Wesley v. Milford, supra*, we said: "The appeal to this court being allowed from the judgment of the general term only, we think it must follow that whatever errors are assigned in this court must be predicated upon the assignment of errors in the general term, and the action of that court in general term thereon. It is proper that the whole record shall come to this court on appeal, but the question here is, whether that court, in general term, erred or not. If an error of the special term has not been assigned in the general term, it can not be presented to this court for the first time."

In the case under consideration, the question whether or not the court in special term erred in refusing to grant a new trial was not presented to the general term by the assignment of errors, and consequently was not and could not have been decided by the general term. The judgment of the general term affirming the judgment was correct, for the reason that there was no question presented to that court by the assignment of errors, whatever may have been the case as to the decision of that court on the questions attempted to be presented by the assignment of errors. The action of that court having been correct, it is the duty of this court to affirm it, whether the decision was placed on the right ground or not.

The judgment is affirmed, with five per cent. damages and costs.

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THE STATE *v.* TRULOCK.

CRIMINAL LAW.—Assault.—Affidavit.—In the affidavit in a prosecution for an assault, the offence is sufficiently described if it be stated in the language of the statute.

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From the Dearborn Circuit Court.

J. C. Denny, Attorney General, and *G. R. Brumblay*,
Prosecuting Attorney, for the State.

PETTIT, J.—The only question in this case is the sufficiency
of the following affidavit:

"State of Indiana, Dearborn County, ss.

"David Thompson, being duly sworn, upon his oath says,
that at said Dearborn county, in the State of Indiana, on or
about the 3d day of November, A. D. 1873, Varnal D.
Trulock did then and there unlawfully assault one David
Thompson, by then and there unlawfully attempting to com-
mit a violent injury upon him, the said David Thompson, he,
the said Varnal D. Trulock, then and there having the
present ability to commit said injury upon the said David
Thompson, and further saith not.

his

"DAVID X THOMPSON.
mark

"Subscribed and sworn to before me, this 3d day of
November, A. D. 1873.

"ISAAC N. CARBAUGH, Justice of the Peace." (Seal)

The court below on the motion of Trulock quashed the
affidavit, and the State excepted, and has brought the case
here. The appellee has not furnished us with any reason or
suggestion why the affidavit is bad, and we are not able to
see any.

We think it fully covers the description of the offence as
given in the statute, which is thus: "An assault is an unlaw-
ful attempt, coupled with a present ability, to commit a vio-
lent injury on the person of another." 3 Ind. Stat. 258,
sec. 1. We hold the affidavit sufficient, and that the court
below erred in quashing it.

The judgment is reversed, at the costs of the appellee.

Detrick v. McGlone et al.

DETRICK v. MCGLONE ET AL.

PRACTICE.—*Supreme Court.*—*Demurrer.*—If a demurrer to a pleading is not in the record, no question can be decided with reference to the overruling of a demurrer to the pleading.

PROMISSORY NOTE.—*Answer.*—*Want of Consideration.*—In a suit upon a promissory note given for a patent right, where a want of consideration is pleaded in answer, the facts that the patented machine was tested and found worthless, and that the defendant offered to rescind the contract, will not defeat a recovery upon the note.

INSTRUCTIONS.—*Inference of Law.*—Where instructions are signed by the judge and copied in the transcript, with the exceptions properly noted by counsel, it will be inferred that they were filed with the clerk, as contemplated by the statute.

TRIAL.—*Separation of Witnesses.*—A judgment will not be reversed on account of a refusal to order a separation of witnesses.

PRACTICE.—*Failure to Reply.*—A failure to file a reply is no reason for the reversal of a judgment; the presumption is that it was waived.

From the Hamilton Circuit Court.

T. J. Kane and A. F. Shirts, for appellant.

J. W. Evans and R. R. Stephenson, for appellees.

DOWNEY, J.—This was an action by the appellant against the appellees. The complaint is in two paragraphs. The first is on a promissory note executed by the defendants to the plaintiff. The second was for goods sold and delivered.

The defendants filed an answer in four paragraphs. 1st. The general denial. 2d. No consideration for the note sued on. 3d. That the note was obtained by fraud in the sale of a patent right. 4th. By way of cross complaint.

The plaintiff demurred to the answer, as the clerk's entry states, but it does not appear in what form or for what cause, as the demurrer is not in the transcript.

The demurrer was overruled. A second trial by jury resulted in a verdict for the defendants, but without assessing any damages in their favor, as asked in the cross complaint. A motion was made by the plaintiff for a new trial, which was overruled, and final judgment rendered against him.

The errors properly assigned are the overruling of the plain-

The Indianapolis, etc., R. W. Co. v. Rinard.

SAME.—A person having duly applied for a ticket, and having been refused without just cause, has the same right to be carried upon paying, or offering to pay, the ticket rate of fare as if he had previously purchased a ticket.

From the Pulaski Common Pleas.

D. Moss, for appellant.

WORDEN, C. J.—This was an action by the appellee against the appellant, to recover damages for the alleged wrongful ejection of the plaintiff from the railway carriage of the defendant.

The action was brought in Miami county, but a change of venue was taken to Pulaski.

Issue, trial by the court, finding and judgment for the plaintiff for six hundred dollars. Motion for a new trial on the ground of overruling a motion to suppress certain portions of a deposition, and that the finding was not sustained by the evidence, overruled, and exception. No point is made on the motion to suppress the depositions. The complaint alleged, in substance, that the plaintiff, being desirous of going from Kokomo to Tipton, went to the defendant's ticket office at the former place, to purchase a ticket for that purpose, at least five minutes before the starting of the train on which the plaintiff desired to go and while the ticket agent was in said office, and applied to the agent for a ticket from the former to the latter of those places, but that the agent refused to sell him such ticket. Thereupon the plaintiff entered one of the cars for the purpose of being transported as above stated, and when the train had got about three miles from Kokomo, the conductor demanded seventy cents as the fare from Kokomo to Tipton, the ticket price being only sixty cents; that the plaintiff offered to pay the sixty cents, but this the conductor refused to receive and demanded the seventy cents; that the plaintiff refusing to pay the seventy cents, the train was stopped, and the plaintiff was put off in the mud and rain at a distance from any house, and at a place not used as a stopping place, etc. The defendant answered by general denial and two special paragraphs.

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The special paragraphs of answer alleged, in substance, that the train of cars upon which the plaintiff entered was a freight train, and run for the purpose of transporting freight and not passengers; but as a special accommodation to the public, the same being a great detriment to the defendants, the defendant did carry passengers thereon, but only on the express condition that they should first procure tickets; that the defendant did not hold herself out as a carrier of passengers on that train, but as an accommodation to the public, she carried them on condition of their having first procured tickets; that the plaintiff not having procured a ticket, and refusing to pay the seventy cents, the regular fare when a ticket was not procured, he was rightfully expelled, etc. A demurrer was sustained to these paragraphs for want of sufficient facts, and exception taken. This ruling is assigned for error.

We think the ruling was clearly right. Railroad companies may, doubtless, discriminate between the amount of fare where a ticket is purchased and where it is paid upon the train. *The Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116.

Perhaps they could make regulations by which no one could be carried at all on trains carrying passengers without having previously procured a ticket. But if they could make such regulations, still they would have no right to discriminate between persons, and sell tickets to some and refuse others, without some just cause. A person having duly applied for a ticket and having been refused, without just cause, would have the same right to be carried upon paying, or offering to pay, the ticket rate of fare, as if he had previously purchased a ticket. In this case, it is alleged that the plaintiff properly applied for a ticket, and that the agent refused to sell him one.

There is nothing in the answer showing any valid reason for the refusal. Such refusal entitled the plaintiff to be carried the same as if he had purchased a ticket, upon his paying, or offering to pay, the ticket rate of fare.

The evidence tends very strongly to make out the case.

DeHaven *et al.* v. DeHaven *et al.*

We can by no means say that the finding is not sustained by the evidence. The damages assessed look pretty large, but that they were excessive was not made a ground for the motion for a new trial. We find no brief on file for the appellee, and as the damages assessed below are doubtless amply sufficient to remunerate the plaintiff, we affirm the judgment below without damages here.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled.

DEHAVEN ET AL. *v.* DEHAVEN ET AL.

PLEADING.—*Demurrer.*—It is not error to sustain a demurrer to a special paragraph of an answer when it puts in issue nothing not also in issue by the general denial.

PRACTICE.—*Bill of Exceptions.*—An exception was taken to a ruling of the court, and time was given "till next term" to file a bill of exceptions, but it was not filed until the sixth day of the next term.

Held, that this was too late. "Till next term" of the court did not include the time during the next term, or any part of it.

From the Fayette Common Pleas.

J. S. Reid and B. F. Claypool, for appellants.

J. C. McIntosh, for appellees.

DOWNEY, J.—This was a petition for the partition of certain real estate situated in Fayette county, filed by John H. DeHaven, Nancy A. DeHaven, Christopher DeHaven, her husband, Nancy Wooters, Isaac Stockdale, John Stockdale, and Elbert Stockdale, against Isaac DeHaven, Jacob DeHaven, and James S. DeHaven. It is alleged that William DeHaven died in 1871, intestate, the owner in fee simple of the real estate; that he died without leaving any issue, or widow; that he left, as his heirs at law, Isaac DeHaven, his father, who, by law, is the owner of one-half of said real

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estate, and brothers and sisters as follows : John H. DeHaven and Nancy A. DeHaven, only representatives of Elizabeth DeHaven, deceased, a sister of said deceased, complainants herein, and Jacob DeHaven and James J. DeHaven, who are made defendants hereto ; that the complainants, Nancy Wooters, Isaac Stockdale, John Stockdale, and Elbert Stockdale are children and representatives of Sarah A. Stockdale, who was a sister of said deceased, and died before his decease. They therefore allege that said John H. DeHaven, Nancy A. DeHaven, James J. DeHaven, and Jacob DeHaven are each the owner in fee simple of one-fifth of one-half of said real estate, and that the said Nancy Wooters, Isaac Stockdale, John Stockdale, and Elbert Stockdale together own in common one-fifth of one-half thereof. Prayer that partition be made, and that the shares of John H. DeHaven and Nancy A. DeHaven be set off to them in severalty, and that the shares of said Nancy Wooters, Isaac Stockdale, John Stockdale, and Elbert Stockdale be set off to them in one body. No question is made as to the sufficiency of the petition.

The first question presented is as to the sufficiency of the second and third paragraphs of the answers of the defendants. The second paragraph alleges facts which controvert the right of Nancy A. DeHaven to have a share of the real estate. It clearly puts in issue nothing not in issue by the general denial which was filed, and for this reason we shall not determine the question whether it was sufficient or not.

The question as to the sufficiency of the third paragraph of the answer is expressly waived by counsel for the appellants in their brief, and it need not therefore be considered.

Upon a trial by the court, there was a finding in accordance with the facts stated in the petition, a motion for a new trial, made by the defendant, overruled, and judgment rendered for partition. Time was given the defendants "till next term" to file their bill of exceptions.

On the second day of the next term, the commissioners reported the partition, to which exceptions were filed, and

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among them one disputing the heirship or right of Nancy A. DeHaven. This exception was stricken out by the court.

The plaintiff replied to the exceptions by a general denial.

The court confirmed the partition as made by the commissioners on the sixth day of the term, and the defendants then filed their bill of exceptions.

The remaining question is as to the sufficiency of the evidence to justify the finding of the court, its insufficiency having been urged as a reason for a new trial.

But here we are met by an objection, which arises in the record, to the consideration of this question. The record shows, as we have seen, that time was given till the next term in which to file the bill of exceptions containing the evidence, and that it was not filed until the sixth day of the next term. "Till the next term of the court" did not include the time during the next term, nor any part of it. *Newby v. Rogers*, 40 Ind. 9. Hence, the bill of exceptions was not filed within the time given, and cannot be regarded as in the record for any purpose.

An exception must be taken at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court. 2 G. & H. 209, sec. 343.

The judgment is affirmed, with costs.

MCCONNELL v. THE STATE.

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CONTEMPT.—*Constructive Contempt.*—*Affidavit.*—If proceedings against a party for a constructive contempt are commenced by affidavit, all the facts necessary to constitute the contempt should be stated in the affidavit.

SAME.—Until a party has been subpoenaed to attend before the grand jury, or a subpoena has been issued for him, it is not a contempt of court for a person to induce him to absent himself in order that he may not be subpoenaed.

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SAME.—*Sufficiency of Affidavit.*—An affidavit charging an indicted person with a contempt of court by informing a witness, subpoenaed to testify on the trial of the indictment, that it was non-prossed, and thus procuring the witness not to attend, without showing that the statement was untrue, is insufficient.

From the Randolph Circuit Court.

J. E. Neff, J. S. Engle, J. J. Cheney, and W. A. Thompson, for appellant.

J. C. Denny, Attorney General, for the State.

WORDEN, C. J.—The proper prosecuting attorney filed an affidavit and an information against the appellant for a contempt of court. Such proceedings were had thereon as that the appellant was fined for the supposed contempt in the sum of twenty-five dollars. From the judgment below, he appeals to this court.

The affidavit, which was made by one William Chapman, alleges, in substance, that on the 30th of April, 1874, there were four indictments pending in the Randolph Circuit Court against the appellant, for selling intoxicating liquors without license, upon which the name of the affiant was placed as prosecuting witness; that warrants had been issued on said indictments for the arrest of the appellant, and that subpoenas had been issued and served on the affiant requiring him to appear and testify as a witness in said causes at the then pending term of the court. The subpoenas were served about a week or ten days before the court.

That on Monday, of the second week of the term, the appellant told the affiant that all the cases against the appellant (including those above mentioned), in which the affiant was the prosecuting witness, had been non-prossed by the prosecuting attorney, and that said witness would not be needed or required to testify further in them; and that if the affiant would go away and absent himself from the court, he could not be got as a witness before the grand jury, and said non-prossed cases got up against him again. The appellant desired the affiant to stay away until the affair was over, the grand jury being then in session. The appellant then and there "unlawfully," "wickedly," and "corruptly," gave to the

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affiant the sum of fifteen dollars, as the inducement to the affiant to absent himself as aforesaid, the affiant believing said indictments were non-prossed, and that he would no longer be required as a witness in said cases, and in consideration of said fifteen dollars so paid, he did absent himself from said court on said second Monday thereof, and continued absent ten days.

Exception was taken to the sufficiency of this affidavit.

The supposed contempt was constructive, and not direct; that is, it was committed in the absence, and not in the presence of the court. In *Whittem v. The State*, 36 Ind. 196, 213, it was held, that "the proceeding against a party for a constructive contempt must be commenced by either a rule to show cause, or by an attachment, and such rule should not be made or attachment issued, unless upon affidavit specifically making the charge."

The theory that in such case an affidavit should be filed implies that all the facts necessary to constitute the contempt should be stated in the affidavit.

Thus tested, the affidavit is defective and insufficient. The witness does not appear to have been subpoenaed to attend before the grand jury, and until he was subpoenaed, or until there was a subpoena issued for him, it was clearly no contempt for the appellant to induce him to absent himself in order that he might not be subpoenaed. Until there was a subpoena issued for the witness, there was no process of the court to be evaded. There can be no contempt in evading, or inducing another to evade, process that has not issued. We need not determine what would have been the result if a subpoena had been issued, but not served upon the witness to attend before the grand jury. As none had been issued, we decide the case upon that state of facts.

The gist of the offence seems to have been in procuring the witness to be absent, so that he might not be subpoenaed and compelled to testify before the grand jury, and what we have said above disposes of that branch of the case. But he had been subpoenaed to appear and testify on the trial of

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the indictments. But the witness was informed by the appellant that the indictments were non-prossed. This statement is not shown by the affidavit to have been untrue, nor does it appear thereby that the witness was called or required to testify upon any trial of the indictments. In any aspect of the case, therefore, the affidavit is insufficient.

The judgment below is reversed, and the cause remanded.

SCOTTEN ET AL. *v.* DIVELBISS ET AL.

APPEAL.—*County Commissioners.*—*Appeal Bond.*—Where an appeal is taken to the circuit court by remonstrants from an order of the board of county commissioners directing a change in a highway, the appeal bond must be approved by the county auditor; and if not so approved, the appeal may be dismissed.

SAME.—If the appeal bond be not so approved, there is no valid appeal, and the defect cannot be cured by filing a bond in the circuit court.

TRANSCRIPT.—*Motion to Perfect.*—A motion to have made out and returned a full and complete transcript of a cause pending on an appeal from the board of county commissioners is rightly overruled, where it does not appear but that the transcript already on file is full and complete.

From the Huntington Circuit Court.

J. R. Slack, B. F. Ibach, and G. W. Shultz, for appellants.
H. B. Sayler and J. B. Kenner, for appellees.

WORDEN, C. J.—The appellees petitioned the board of commissioners for a change in a highway. The appellants remonstrated. Such proceedings were had before the board as that the change was granted. The remonstrants appealed to the circuit court.

The record shows that the bond executed for the appeal to the circuit court was "accepted and approved by the board and appeal granted."

In the circuit court, the appellees moved to dismiss the

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appeal, on the ground that the bond filed had no sureties thereon, and had not been approved by the auditor as required by law. The appeal bond was signed only by John J. Scotten and Robert White, who were two of the remonstrants; so there were no sureties on the bond unless Ibach and Shultz, whose names are upon the bond as "attorneys for the remonstrators," are to be regarded as sureties. The appellees proved by the auditor that he had at no time approved the bond. The court thereupon dismissed the appeal, and the appellants excepted.

The decision was clearly right. The bond in such case is required to be approved by the auditor. 1 G. & H. 364, sec. 26; *Shepherd v. Dodd*, 15 Ind. 217; *McVey v. Heavenridge*, 30 Ind. 100.

Pending the motion to dismiss, the appellants moved to be permitted to place on file a new bond, with good and sufficient surety, but this motion was overruled, and exception taken. This ruling, according to the case of *McVey v. Heavenridge, supra*, was right. There having been no valid appeal taken by the filing of a bond to the approval of the auditor, the defect could not be cured by the filing of a bond in the circuit court. Besides this, no bond was produced and exhibited to the court for its inspection and approval, even if the court had power to approve such bond. See *Richardson v. Howk*, 45 Ind. 451, and *The State v. Toohy, post*, p. 378.

Pending the motion to dismiss the appeal, the appellants moved the court for an order on the auditor to make out and return to the court a full and complete transcript of the proceedings in the cause, which motion was overruled, and exception taken. This ruling does not appear to have been erroneous, inasmuch as it does not appear but that the transcript already filed was full and complete. There was no affidavit or other showing that the transcript filed was defective.

On the dismissal of the appeal, the court rendered judgment for costs against the appellants, and this is assigned for

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error. The bill of exceptions filed in the cause does not show that any objection was made or exception taken to the judgment for costs.

The judgment below is affirmed, with costs.

BETHELL *v.* MCCOOL ET AL.

TENANTS IN COMMON.—*Action for Possession.*—One tenant in common may maintain an action for the possession of his part of the real estate, where there is a denial of his right by his co-tenants or some act amounting to such denial.

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From the Warrick Circuit Court.

I. S. Moore, for appellant.

Hynes & Fuller, for appellees.

DOWNEY, J.—The appellant sued the appellees, alleging in his complaint, that he was the owner in fee simple and entitled to the possession of the undivided one-third of certain real estate particularly described in the complaint; that the defendants were each entitled to the undivided one-third of the same; that the defendants had possession of the part belonging to the plaintiff, without right, denying the plaintiff's title thereto, and for six years past had unlawfully kept the plaintiff out of possession thereof.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action against the defendants. The court sustained the demurrer, and rendered final judgment for the defendants. This ruling of the court is the error assigned.

There is no brief for the appellees.

It is stated in the brief of counsel for the appellant, that the court sustained the demurrer for the reason that one

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tenant in common could not sustain an action to recover the possession of a part of the common estate.

Sec. 592, 2 G. & H. 281, provides, that "any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title, or some interest therein."

Sec. 614, 2 G. & H. 285, provides: "In an action by a tenant in common or joint tenant of real property, against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial."

This question was presented and decided in favor of the position of the appellant in *Nelson v. Davis*, 35 Ind. 474.

In such cases there must, at common law, probably have been an actual ouster of the tenant suing. Adams Eject. 91.

Under our statute, above quoted, there must have been a denial of the plaintiff's right, or some act amounting to such denial. That is substantially alleged in this case.

The court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with instructions to overrule the demurrer to the complaint.



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From the Montgomery Circuit Court.

G. D. Hurley, J. E. McDonald, J. M. Butler, F. B. McDonald, and *G. C. Butler*, for appellant.

J. C. Denny, Attorney General, for the State.

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DOWNEY, J.—This was an indictment against the appellant for selling intoxicating liquor to a minor. The only question in the case as presented by counsel is, was the evidence sufficient to justify the verdict of the jury?

The evidence does not clearly connect the defendant with the sale of the liquor, by showing that he sold it to the minor, directed the sale, or was present assenting to it. The case must be governed by the principle enunciated in *Hanson v. The State*, 43 Ind. 550.

The judgment is reversed, and the cause remanded for a new trial.

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EVIDENCE.—Corporation.—Ownership of property by a corporation may be proved by the same kind of evidence that would prove ownership in a natural person.

VARIANCE.—Malicious Trespass.—Where a party was indicted for malicious trespass in injuring a toll-gate charged to be the property of "The Madison, Smyrna, and Graham Gravel Road Company," and the evidence showed that the gate injured belonged to "The Madison, Smyrna, and Graham Turnpike or Gravel Road Company," and that there was but one corporation answering to either name, and that had the latter name, the variance was immaterial.

PRACTICE.—Arrest of Judgment.—Fine.—That a fine is assessed jointly against two defendants is no ground for arrest of judgment.

From the Jefferson Circuit Court.

F. L. Wilson and E. R. Wilson, for appellants.

F. C. Denny, Attorney General, for the State.

DOWNEY, J.—This was an indictment against the appellants for malicious trespass in injuring a toll-gate alleged to be the property of "The Madison, Smyrna, and Graham Gravel Road Company." On arraignment, the defendants pleaded not guilty. The issue was tried by a jury, and there

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was a verdict that the defendants were guilty. They moved for a new trial, and afterward in arrest of judgment, but these motions were overruled, and sentence pronounced against them.

They allege two errors in the proceedings.

1. The refusal to grant them a new trial; and,
2. Overruling their motion in arrest of judgment.

Under the first assignment, it is urged as a reason why a new trial should have been granted, that the court erred in admitting the evidence of one Dean, that the gate in question was the property of the company named in the indictment. The bill of exceptions states that this evidence was objected to, "for the reason that it was attempting to prove the existence of the corporation by verbal testimony, without laying any foundation to prove that fact by that kind of evidence." We see no good ground for this objection. Ownership of property by a corporation may be proved by the same kind of evidence that may be received from a natural person to prove the ownership of property by him. If it was intended to raise a question as to the existence of the corporation, it was not done. The witness testified to nothing concerning the existence of the corporation.

Ultimately, however, the fact was disclosed, by the introduction of the articles of association of the company by the defendants, that the name of the corporation was "The Madison, Smyrna, and Graham Turnpike or Gravel Road Company;" and a question arises, with reference to a charge given by the court to the jury, whether this variance in the name is material. The evidence tends to show that there was but one corporation answering to either name, and that was "The Madison, Smyrna, and Graham Turnpike or Gravel Road Company," to which the gate belonged. In our opinion, the variance was not so material as to defeat the prosecution. The name of the owner of the property injured is required to be given as a part of the description of the offence, and it is for the information of the defendant. The variance in this case could not have misled the

The State, *ex rel.* Clifford, *v.* McMullen.

defendant. The court, in the instruction referred to, did not put the case on this exact ground, but did so substantially. With reference to variances in the names of corporations, see *Glass v. The Tipton, etc., Co.*, 32 Ind. 376, and *Chase v. The Arctic Ditchers*, 43 Ind. 74.

It is urged that the evidence did not warrant the amount of the fine, but we think we cannot disturb the judgment on this ground.

The ground on which it was claimed that the judgment should have been arrested is, that the verdict is joint, and that it cannot be determined for what amount judgment should be rendered against each of the defendants.

Without deciding whether this objection might or might not have been successfully urged in some other way, we are of the opinion that it is not a ground for arresting the judgment. Under the criminal code, there are but two grounds on which the judgment can be arrested: 1. Want of authority in the grand jury to inquire into the offence, by reason of its not being within the jurisdiction of the court; and, 2. That the facts stated do not constitute a public offence. 2 G. & H. 424, sec. 144; Bicknell Crim. Prac. 244.

The judgment is affirmed, with costs.

THE STATE, EX REL. CLIFFORD, *v.* McMULLEN.

OFFICE.—Township Trustee.—Vacancy.—The facts that a township trustee, who was a candidate for re-election, and the opposing candidate each received at the election an equal number of votes, and the trustee neglected or fraudulently refused to discharge the duties required of him by law in case of a tie vote, did not create a vacancy in the office or authorize the county auditor to make an appointment to fill such office.

From the Hamilton Circuit Court.

T. J. Kane and A. F. Shirts, for appellant.

The State, *ex rel.* Clifford, *v.* McMullen.

PETTIT, J.—This was an information under our statute, which takes the place of the common law writ of *quo warranto*, by the appellant against the appellee, to oust him from the office of township trustee, and to place the relator in possession thereof; and this is the information entire:

"The plaintiff complains of the defendant, and says that said defendant, on the 8th day of October, 1870, to wit, on the second Tuesday of October, 1870, was duly elected trustee in and for Jackson township, in Hamilton County, in the State of Indiana, for the term of one year from said second Tuesday in October, 1870, or until his successor should be elected and qualified; that the term of office of said defendant, by virtue of certain statutory provisions thereafter passed by proper authority, said term of office of trustee did not expire until the — day of October, 1872, or the second Tuesday of October, 1872, at which last named date there was a general election held in said county of Hamilton, in the State of Indiana, for state, county, and township offices; that the defendant and one Matthew Wright were both candidates at said election for township trustee in said township of Jackson, in said county of Hamilton, in the State of Indiana, and that they each of them at said election received an equal number of votes, and a greater number of votes than any other persons at said election for said office of trustee; that said defendant, being then trustee and by provisions of the statute being the president of the election board in said township, unlawfully, wilfully, and corruptly, failed, neglected, and refused either to call together the board of commissioners, or to notify the said Matthew Wright that said vote was a tie vote as between him and the said Matthew Wright, and determine the same by lot; he also failed to certify to the county clerk the facts above set forth, for the fraudulent purpose of preventing said election to be perfected in manner and form as provided by law, and for the further purpose of affording a pretence to said defendant to continue to act as trustee of said township by virtue of his said election in 1870. The said defendant also failed

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to avail himself of the statutory provisions for contesting in manner and form the election of said Wright; and the plaintiff further avers that afterward, to wit, on the 28th day of October, 1872, the above and foregoing facts being placed before Elisha Mills, the then auditor of Hamilton county, who is and was by law at that time authorized and required to fill all vacancies in the office of township trustee in his said county, having determined that a vacancy existed in said office of trustee in said township in said county, issued to the plaintiff his certificate of appointment to said office, a copy of which is filed herewith.

“Auditor’s Office, Noblesville, Hamilton County, Ind., Oct. 28th, 1872. This is to certify that I, Elisha Mills, auditor in and for said county, have this day appointed Luther O. Clifford to be trustee of Jackson township, in said county, to fill a vacancy now existing in said office, and to serve as such trustee until the next general election, and until his successor is elected and qualified. In witness whereof I have hereto set my hand and official seal this 28th day of October, 1872.

“ELISHA MILLS, Auditor of Hamilton County.”

“That the plaintiff immediately, and within ten days from said appointment by said auditor, filed his bond and qualified preparatory to entering upon the duties of said office, and called upon and demanded of the defendant all books, papers, and other property belonging to said township, with which said demand the defendant failed and refused to comply; and that said defendant, without qualifying or giving bond anew, still claims to be trustee of said township and wrongfully and corruptly continues to discharge the duties of said office and receive the fees and emoluments of said office, and unlawfully keeps the plaintiff out of the possession of the same, thereby usurping said office; wherefore the plaintiff asks the court to issue a writ of *quo warranto* against the defendant, to show cause why he does not deliver said books and papers to said plaintiff, and why he intermeddles with said office; and on the final hearing of said cause the plaintiff asks that said defendant be compelled to

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deliver to the plaintiff all books and papers now in his hands belonging to said township, and asks for other proper relief."

This information was sworn to by the relator. A demurrer for want of sufficient facts was sustained to the information, and the correctness of this ruling is the only question in the case. The appellee has furnished us no brief or suggestion as to the insufficiency of the information, but the counsel of appellant says that the court sustained the demurrer because there was no vacancy in the office, and cites *Howard v. The State, ex rel. Vawter*, 10 Ind. 99, as an authority in point. That was a mandate against the clerk to compel him to issue a certificate, which the law made it his duty to do, while this is an information to remove a man from office and install another in it. There is no analogy between the two cases. A township trustee is to hold his office till his successor is elected and qualified. 1 G. & H. 637, sec. 5. This section has been changed or repealed only as to the time of holding the election, which is from April to October. 3 Ind. Stat. 233, sec. 2.

The failure of an officer to do his duty may be a cause for his removal, but it does not of or by itself remove him or create a vacancy in his office. Perhaps a mandate might have been enforced against the appellee to compel him to do the acts which it is alleged he ought to have done but failed to do, but his failure to do them did not make his office vacant. We hold that the office was not vacant, and that the appointment of the auditor was a nullity.

The court committed no error in sustaining the demurrer to the information.

The judgment is affirmed, at the costs of the relator.

Binns v. The State.

BINNS v. THE STATE.

46	311
150	66
46	311
180	468

CRIMINAL LAW.—*Instructions.*—*Alibi.*—Upon the trial of a defendant on a criminal charge, where there is evidence tending to prove an *alibi*, it is proper to instruct the jury that if, from the evidence, they have a reasonable doubt as to whether the defendant was at the place where the crime was committed, at the time, or was at the place where the evidence tends to show he was, they should find him not guilty.

SAME.—In such case it is error to instruct the jury that the defence of *alibi* is good, if proved true by witnesses worthy of credit, but does not belong to the doctrine of doubts, which entitles the defendant to be acquitted, but when established, it entitles the defendant to be acquitted upon the higher ground of innocence established.

SAME.—*Evidence.*—On a trial of an indictment for murder, it is error to admit in evidence against the defendant a transcript of the pleadings and papers in an action of divorce by the deceased against the defendant, pending in court and undetermined at the time of the alleged murder.

SAME.—*Declarations in Extremis.*—*Opinion not Admissible as Such.*—On a trial for murder, declarations of the deceased, made when *in extremis*, consisting of expressions of opinion as to who it was that fired the fatal shot, based on previous threats and what had previously occurred between the deceased and the accused, are inadmissible.

SAME.—Where a written memorandum of declarations made *in extremis* is not signed, parol evidence of such declarations is admissible. If signed, the writing should be produced or accounted for.

From the Howard Circuit Court.

C. E. Hendry, M. Bell, and W. March, for appellant.

J. C. Denny, Attorney General, *J. F. Elliott*, Prosecuting Attorney, and *N. R. Lindsay*, for the State.

DOWNEY, J.—This was an indictment against the appellant, charging that on the 31st day of January, 1870, at, etc., he did unlawfully, feloniously, purposely, and with premeditated malice, kill and murder Rachel Binns, by then and there, etc., shooting her with a pistol. The indictment, as will be seen, charges murder in the first degree, and no objection is made to it. On the first conviction of the defendant, upon appeal to this court, the judgment was reversed for the refusal of the court to grant the defendant a continuance on account of absent witnesses, by whom he

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claimed he could prove that he was at another place when the crime was committed. 38 Ind. 277.

On a second trial of the cause in the circuit court, the defendant was found guilty, and his punishment fixed at imprisonment for life, a new trial refused, and sentence pronounced against him. There was evidence on the part of the defendant tending to prove that he was at Kokomo, ten or twelve miles from the place where the crime was committed, at the time of its commission. The court was requested by the defendant to instruct the jury as follows :

" If the jury, when taking into consideration all the evidence, have a reasonable doubt as to whether the defendant was at the scene of the alleged shooting, at the time it took place, or was in Kokomo, they should find him not guilty."

This the court refused to do, and on this subject gave the following direction to the jury : " The defendant has offered evidence tending to prove an *alibi*, that is, that he was somewhere else at the time the wound was inflicted upon Mrs. Binns. This is a sufficient legal defence, if it is proven to be true by testimony of witnesses who are worthy of credit and entitled to be believed by you. The defence of *alibi* does not belong to the doctrine of doubts, which entitles the defendant to be acquitted. But when it is successfully established by the evidence, it entitles the defendant to an acquittal upon the higher ground of innocence established. A defendant can not be guilty of crime and be some other place at the very time of its commission, so far away as to make it impossible for him to commit the crime." The court should have given the instruction asked, and should not have given that which it gave. *French v. The State*, 12 Ind. 670; *Adams v. The State*, 42 Ind. 373; *Polk v. The State*, 19 Ind. 170.

At the time when the killing took place, there was a suit pending in the Cass Circuit Court by the deceased against the defendant for a divorce, in the petition in which she charged him with failing to provide, with cruel treatment by personal violence, by opprobrious and slanderous epithets, and

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with consorting with "bad women." In that cause an injunction had been granted, a receiver appointed, and an order made and enforced against him for the payment of money to her, etc. A transcript of the papers and entries in that case was offered in evidence in this case. The defendant objected to it as irrelevant and illegal, and also objected to all of it except so much as showed the pendency of an action between the parties, and the orders and doings of the court therein. The objection was overruled, and the whole transcript was allowed to be read in evidence to the jury. We think this action of the court can not be justified. The statements in the petition for divorce were the mere *ex parte* statements of the deceased, and were no evidence against the defendant of the truth of the matters alleged therein. No judgment had been rendered upon the petition. The matters stated therein had not been found to be true, and upon no principle of law could they properly have been received as evidence against the defendant.

A question is made concerning the admission by the court of certain declarations of the deceased, made when *in extremis*. She stated that it was her husband, the defendant, who shot her. The shot was fired, it appeared, through a window, after night. She stated, that he had said he could and would shoot her through that window if she did not sign certain papers concerning some money. She did not pretend, as the witness stated, that she could or did recognize the person who shot her. The evidence of her declarations was objected to, on the ground that she was not shown to have been *in extremis* when she made them; that the circumstances of the death of said Rachel were not the subject of the declarations, but mere threats and opinions; and that it appeared that the declarations were reduced to writing, and the writing should be produced. It seems to us that the evidence shows that the deceased was without hope of recovery and apprehending almost immediate dissolution at the time she made the declarations, and that, so far as this objection is concerned, the action of the court was proper. As to the second

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ground of objection, it is clear that a mere expression of opinion by the deceased would not be admissible, for that would not be received as evidence from her, if she had been testifying as a living witness on the trial. Greenleaf says: "The declarations of the deceased are admissible only to those things, to which he would have been competent to testify, if sworn in the cause. They must, therefore, in general, speak to facts only, and not to mere matters of opinion; and must be confined to what is relevant to the issue." Vol. 1, sec. 159. It is evident that the deceased, so far as her statement shows, had no reason for believing that it was her husband who shot her, except from what had previously occurred between them, and what he had then said in the form of threats. We think her statement as to previous threats was inadmissible. The same author to whom we have already referred says: "It was at one time held, by respectable authorities, that this general principle warranted the admission of dying declarations in all cases, civil and criminal; but it is now well settled that they are admissible, as such, only in cases of homicide, 'where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations.'" Vol. 1, sec. 156. 2 Russell Crimes, 761; Wharton Crim. Law, sec. 670. For this reason it seems to us the declarations should not have been admitted, or the court should have told the jury to disregard them. That the written memorandum of the declarations was not produced, did not require the court to exclude the parol evidence of them, if otherwise proper. The memorandum was not signed. Had it been, then it should have been produced or accounted for. 1 Greenl. Ev., sec. 161.

Several other reasons why a new trial should have been granted are stated by counsel for the appellant, but we do not deem it necessary to examine any more of them.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial; and the clerk will certify to the warden of the state prison as required by law.

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THE AURORA FIRE INSURANCE COMPANY v. JOHNSON.

PRACTICE.—*Bill of Exceptions.*—*Motions and Affidavits.*—Motions, affidavits, and other papers cannot be made a part of the record by a reference in a bill of exceptions to a part of the transcript where they may be found.

SAME.—*Validity of Bill of Exceptions.*—The validity of a bill of exceptions depends upon the approval and signature of the judge.

INSTRUCTIONS.—*Presumed to be Correct.*—If, under any supposed state of the evidence, instructions given could have been correct, it will be presumed, the evidence not being in the record, that such evidence was given.

SAME.—*Record.*—Copying instructions given into a motion for a new trial will not make them a part of the record.

SAME.—*How Made Part of Record.*—An exception noted to the giving of an instruction at the end thereof and signed by the party excepting, or his attorney, is sufficient to make the instruction and exception a part of the record.

PRACTICE.—*Change of Venue.*—*Time of Trial.*—Where a cause was pending in a common pleas court, and a change of venue was taken from the judge, the court had power to fix a time in vacation for the trial of said cause.

JURISDICTION.—*Waiver by Appearance.*—Where a court has jurisdiction of the subject-matter of an action, an appearance to the action in the court to which a change of venue has been taken is a waiver of any objection to the jurisdiction over the person, or as to the regularity of the change of venue.

PLEADING.—*Complaint on Insurance Policy.*—*Description of Property.*—A complaint on a policy of insurance need not be more specific than the policy in the description of the property insured.

SAME.—*Interest in Property Insured.*—A complaint upon a policy of insurance should allege that the assured had an interest in the property insured, and to what amount, at the commencement of the risk and at the time of the loss, but it is not necessary to state the plaintiff's title to, or ownership in, the property.

SAME.—*Damage of Plaintiff.*—Where a schedule filed with a complaint on a policy of insurance sets out the items destroyed by fire and the value of each, as well as the aggregate value, the complaint will sufficiently show that the plaintiff has been damaged.

INSURANCE.—*Open Policy.*—*Over-Valuation.*—In an open policy of insurance, an over-valuation of the property insured is immaterial.

PRACTICE.—It is not error to sustain a demurrer to a paragraph of answer, when the same facts are admissible in evidence under another paragraph upon which issue is joined.

PLEADING.—*Insurance Policy.*—*Answer.*—*Fraudulent Statement of Loss.*—An answer to a suit on an insurance policy, that the plaintiff fraudulently stated the amount of loss to be greater than it was, without showing that the statement was made to the insurance company or its agent, or in any transaction in relation to the loss, is bad.

46	315
152	474
46	315
143	367
46	315
152	169
152	170
46	315
159	19
46	315
164	378

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SAME.—Permitting Loss.—So, also, an answer alleging that the plaintiff negligently stood by and permitted the property to be consumed, and made no reasonable exertion to prevent the fire or save the insured property, is bad where it is not averred that it was within his power to have prevented the fire or loss of the property.

SAME.—Inspection of Books and Papers.—Where the conditions of a policy of insurance require the insured, in case of loss, to produce his books of account and other vouchers in support of his claim, and permit copies and extracts thereof to be made, whenever required in writing, an answer alleging a refusal to produce them, without alleging a request in writing, is bad.

SAME.—Examination Under Oath.—Where a policy of insurance makes it the duty of the insured in case of loss to submit to an examination under oath by the agent or attorney of the insurance company, an answer alleging generally a refusal to submit to an examination, without showing when or by whom the request was made, or that a time or place was named for such examination, is bad.

SAME.—Reply.—Where an answer to a suit on a policy of insurance covering materials and machinery used in manufacturing tobacco alleges that the risk had been materially increased by using the third story of the building occupied as a store-room for old boxes, casks, and rubbish, a reply that the boxes, etc., were used and were necessary materials in the business, and constituted a part of the risk insured against, is good.

SAME.—Reply.—Excuse for not Producing Books.—Where an answer to a suit on a policy of insurance alleges a failure on the part of the insured to produce his books and bills of purchases, etc., a reply that they were destroyed by fire shows a good excuse.

FOREIGN INSURANCE COMPANY.—Certificate of Nearest Magistrate.—Statute.—By the sixth section of the act of December 21st, 1865, 3 Ind. Stat. 315, a foreign insurance company cannot require a certificate of loss to be certified by the nearest magistrate.

From the Jefferson Circuit Court.

J. Y. Allison and W. S. Friedley, for appellant.

H. W. Harrington and C. A. Korby, for appellee.

BUSKIRK, J.—This was an action by the appellee against the appellant, upon a policy of insurance, to recover damages alleged to have been sustained by the destruction, by fire, of the insured property.

The action was commenced in the Jefferson Common Pleas. The process was served upon the local agent. In that court an appearance was entered by such agent, and a rule was taken against the appellant to answer. Upon a subsequent day, the appellant entered a special appearance

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by Allison & Friedley, her attorneys, and moved the court to set aside the appearance previously entered and to quash the writ ; and in support of such motion certain affidavits were filed, and certificates as to the appointment of a local agent were read. The motion was overruled, and this ruling is assigned for error.

It is well settled, that such a motion and the affidavits and other papers read in support of it can only become a part of the record by a bill of exceptions. *Taylor v. Fletcher*, 15 Ind. 80; *The Indianapolis, etc., R.R. Co. v. Wyatt*, 16 Ind. 204; *Round v. The State*, 14 Ind. 493; *Thompson v. White*, 18 Ind. 373; *Whiteside v. Adams*, 26 Ind. 250.

The clerk has copied into the record what purport to be such motion, affidavits, and other papers. This did not make them part of the record. The clerk has also copied in the record what purports to be a bill of exceptions, but it is not signed by the judge. The validity of a bill of exceptions depends upon the approval and signature of the judge. 2 G. & H. 209, sec. 346; *Haddon v. Haddon*, 42 Ind. 378. Besides, if the bill had been properly approved and signed by the judge, it would not have put into the record the motion, affidavit, and other papers read, because they are not copied into what purports to be the bill of exceptions, but the blanks left are filled with references to the page of the record where such papers would be found. This did not make them a part of the record. *Kesler v. Myers*, 41 Ind. 543, and authorities cited. No question is presented in reference to such motion, as we cannot decide it without the evidence which was before the court below.

At this point, the appellant applied for and obtained a change of venue from the judge of the common pleas court, and the cause was set down for trial before the Hon. John G. Berkshire, judge of the circuit court, at a time named, in vacation of the common pleas.

At the time fixed, Judge Berkshire appeared and assumed jurisdiction of the case. The parties appeared, and the appellant demurred to the complaint, upon the grounds that

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the court had no jurisdiction of the defendant, and that the complaint did not contain facts sufficient to constitute a cause of action. The demurrer was overruled, and the appellant excepted.

The appellant answered in thirteen paragraphs. The appellee demurred separately to all of said paragraphs, except the first, twelfth, and thirteenth. The demurrer was sustained to the fifth, sixth, seventh, eighth, and ninth paragraphs, and the appellant excepted, and was overruled to the second, third, fourth, tenth, and eleventh, and the appellee excepted. The appellant then filed substitutes for the said fifth and tenth paragraphs, and an additional paragraph numbered ten and one-half. This leaves for review here the action of the court in sustaining the demurrer to the sixth, seventh, eighth, and ninth paragraphs of the answer.

The appellee filed a reply consisting of ten paragraphs. The appellant demurred to all except the first. The demurrer was sustained as to the third, fifth, ninth, and tenth, to which the appellee excepted, and was overruled as to the second, fourth, sixth, seventh, and eighth paragraphs, and the appellant excepted.

The cause was submitted to a jury for trial, and resulted in the finding of a general verdict for the appellee and answers to special interrogatories. The court, over a motion for a new trial, rendered judgment on the verdict.

The evidence is not in the record, and consequently no question arises as to the sufficiency of the evidence to sustain the verdict or as to the correctness of the instructions given. It is settled by a long line of decisions in this court, that if, under any supposable state of the evidence, the instructions could have been correct, it will be presumed, the evidence not being in the record, that that state did exist. See the cases supporting the above proposition, collected in note *d*, on page 200, 2 G. & H.

Besides, the instructions are not properly in the record or properly excepted to. They are copied into the motion for a new trial, but there is no exception noted to the giving of

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each instruction at the end thereof and signed by the appellant or her attorneys. This would have been sufficient to have made the instructions and the exceptions thereto a part of the record. *The Jeffersonville, etc., Railroad Co. v. Cox*, 37 Ind. 325. The appellant, however, attempted to place the instructions and her exceptions thereto in the record by a bill of exceptions, but the clerk in making out the transcript, instead of copying the instructions into the bill of exceptions, has filled the blank intended for such insertion with a reference to the page of the transcript where they would be found. The copying of the instructions into the motion for a new trial did not make them a part of the record. *Gaff v. Hutchinson*, 38 Ind. 341. The reference to them in the bill of exceptions did not make them a part of the record. *Stewart v. Rankin*, 39 Ind. 161; *Kesler v. Myers*, 41 Ind. 543.

It is true the bill of exceptions says that the appellant excepted to the giving of certain instructions, but they not being in the record, we cannot know what they were, and the evidence not being in the record, we would be compelled to presume they were correct if applicable to any supposable state of the evidence.

This leaves for our determination the action of the court in overruling the demurrer to the complaint, the sustaining of the demurrer to the sixth, seventh, eighth, and ninth paragraphs of the answer, and the overruling of the demurrer to the second, fourth, sixth, seventh, and eighth paragraphs of the reply.

Did the court err in overruling the demurrer to the complaint? Two questions are presented by this demurrer:

1. Whether the court had jurisdiction of the defendant; and,
2. Whether the facts stated in the complaint were sufficient to constitute a cause of action.

When the demurrer was filed, the cause was pending in the common pleas, the court being held by Judge Berkshire, of the circuit court. It was admitted by the demur-

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rer, and is conceded here, that the court possessed full jurisdiction of the subject-matter of the action. The question sought to be raised is, whether, when the judge of the common pleas granted the change of venue and called the circuit judge to preside and try the cause, he possessed the power to fix a time, in vacation, for the trial of said cause? Counsel for appellant state in their brief that the court did not possess the power to fix a time in vacation for holding said court for the trial of this cause, but no statute or adjudged case is referred to in support of such proposition. The granting of changes of venue in civil cases is governed by section 207 of the code and section 208 as amended by the acts of 1861, 2 G. & H. 154, 155. The seventh clause of section 207 provides, that "when either party shall make and file an affidavit of the bias, prejudice or interest of the judge before whom the said cause is pending, the said court shall grant a change of venue."

It is provided by section 208, as amended, that "upon the granting of such change of venue for any of the causes mentioned in the first, second, sixth and seventh specifications of section 207, the judge shall appoint a time to hold said trial, which shall not be less than sixty days from that time; or it may be tried at the same term the change is made, and it shall be his duty to call some judge of the court of common pleas, circuit court, or of the Supreme Court, if such case be in the circuit court, and if in the common pleas court any judge of the Supreme, circuit, or common pleas court to try said cause, who shall try or continue the same, or change the venue thereof, as if it had originally been brought before him."

The above section in express terms gave to the court below power to fix a time, in vacation, for the trial of said cause. There seems to be no room to doubt that the action of the court below was strictly in accordance with the statute. This ruling does not conflict with that in *Ex Parte Skeen*, 41 Ind. 418. That was a criminal cause and was governed by a statute very different from the one above quoted in reference to civil cases.

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If, however, there had been any want of power to appoint a time, in vacation, for the trial of said cause, the question of jurisdiction over the defendant was waived.

It appears from the record that after the demurrer was overruled, the cause was, by agreement of the parties, transferred to the circuit court for trial, and that the parties appeared in that court and went to trial without any objection. The agreement of the parties entered in the common pleas court gave the circuit court jurisdiction of the person of the appellant, and the law gave it jurisdiction of the subject-matter of the suit. It is well settled that where the court has jurisdiction of the subject-matter of the action, an appearance to the action in the court to which a change of venue has been taken is a waiver of any objection of jurisdiction over the person or as to the regularity of the change of venue. *Bosley v. Farquar*, 2 Blackf. 61; *Wilson v. Coles*, 2 Blackf. 402; *Clark v. The State*, 4 Ind. 268; *Mahon v. Mahon's Adm'r*, 19 Ind. 324; *McDougle v. Gates*, 21 Ind. 65; *Judah v. The Trustees of Vincennes University*, 23 Ind. 272; *Cox v. Pruitt*, 25 Ind. 90; *Smith v. Jeffries*, 25 Ind. 376; *Gardner's Adm'r v. Board*, 27 Ind. 323; *Street v. Chapman*, 29 Ind. 142; *Hamrick v. The Danville, etc., G. R. Co.*, 32 Ind. 347.

We proceed to inquire whether there was a deficiency in the statement of the facts of the complaint. It is claimed by appellant's counsel that the complaint does not sufficiently allege the interest of the appellee in the property insured and destroyed. The allegations of interest to be found in the complaint are as follows:

"That the plaintiff, on the 10th day of March, 1871, was interested in certain property in the city of Madison herein-after more fully described, then in the plaintiff's possession, to the value of ten thousand dollars, and so continued interested until the destruction of said property as hereinafter alleged."

Again it is averred, "thirteen thousand dollars on *his* (plaintiff's) stock of manufactured and unmanufactured

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tobacco," etc. The property is also described in the policy of insurance which was filed with and made a part of the complaint as *his* (Johnson's).

The policy in the present case does not enumerate specific articles, but covers classes of property, as stock of manufactured and unmanufactured tobacco, extracts, and machinery. The complaint need not be more specific in the description of the property insured than the policy. The proof will, of necessity, show the items of the loss and their value and the extent and nature of the interest. *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. 419; *Locke v. North Amer. Ins. Co.*, 13 Mass. 61; *Smith v. Bowditch, etc., Ins. Co.*, 6 Cush. 448.

The complaint should allege that the assured had an interest in the property insured, and to what amount, at the commencement of the risk and at the time of the loss, but it was not necessary to state the plaintiff's title to or ownership in the property insured against loss by fire. *Gilbert v. The National Insurance Co.*, 12 Irish Law, 143; S. C., 2 Bennett Fire Ins. Cas. 690; Phillips Ins., sec. 2020; *Granger v. Howard Insurance Co.*, 5 Wend. 200; Marshall Ins. 682; *De Forest v. The Fulton Fire Insurance Co.*, 1 Hall, 84; *Van Natta v. Mutual, etc., Insurance Co.*, 2 Sandf. 490; Angell Ins. 218, sec. 182; Phillips Ins., sec. 354.

An averment of interest became necessary after the wager of policies was prohibited. *Nantes v. Thompson*, 2 East, 385; *Buchanan v. Ocean Ins. Co.*, 6 Cowen, 332; Phillips Ins., sec. 2018.

In *Granger v. Howard Ins. Co., supra*, Mr. Chief Justice SAVAGE met a similar objection thus:

"It is objected that the counts do not specify the nature or extent of the plaintiff's interest. In 2 Marshall, 682, it is said: 'The averment of interest in the insured may be either general or special; under a general averment of interest, the plaintiff may give in evidence any interest he may have in the thing insured; but if the interest be averred specially, it must be proved as stated. The general aver-

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ment is therefore in most cases to be preferred.' The counts in this case are in the usual form, that the plaintiff was interested in the subject-matter insured to the amount insured; and was there no objection to the maintenance of the action by the plaintiff in his character of assignee, this point would be no bar to a recovery."

The complaint in the present action conforms to the precedent to be found in note 5 to section 404, 2 Greenleaf Evidence.

It is, in the second place, insisted that there is no statement that the rights of the appellee have been injured or destroyed, and nothing as to damages.

We think the objection is not sustained by the record. The complaint alleges, that "all of said property (fully described in schedule A, and filed herewith), was accidentally and by misfortune totally consumed by fire." The schedule referred to sets forth the property destroyed, by items, with the value set opposite in figures. The total value is nine thousand and seventy-two dollars. The notary's certificate is recited in the complaint, to the effect "that the plaintiff really and by misfortune has sustained by said fire loss and damage to the amount of the sum mentioned in said certificate, to wit, nine thousand and seventy-two dollars," etc. In the conclusion of the complaint, a judgment is demanded for the sum of thirty-one hundred dollars. The precedents do not contain any more definite allegations of loss and damage. The loss averred in the complaint is a total loss. The value of the property at the time of the loss is given in dollars and cents in the schedule which is made a part of the complaint. An interest in the insured property to the value of ten thousand dollars is set forth in the complaint, and its value alleged to be nine thousand and seventy-two dollars. The loss being alleged to be total, the damages sustained would be implied, were it not required by the code that where a recovery of money is demanded, the amount thereof shall be stated. Clause 4 of section 49 of the code, 2 G. & H.

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76. This requirement was complied with in the present case.

In our opinion, the court possessed jurisdiction of the subject-matter of the action and of the appellant, and the complaint contained facts sufficient to constitute a cause of action, and, hence, the court committed no error in overruling the demurrer thereto.

We next inquire whether the court erred in sustaining the demurrer to the sixth, seventh, eighth, and ninth paragraphs of the answer.

The sixth paragraph was as follows:

"And for further answer, the said defendant says said plaintiff falsely and fraudulently represented at the time of the issuing of said policy, that said machinery used by him in manufacturing tobacco to be insured was of the value of two thousand five hundred dollars, when it was only of the value of nine hundred dollars, and falsely and fraudulently represented that said manufactured and unmanufactured tobacco was of the value of three thousand five hundred dollars, when it was only of the value of one thousand dollars; and falsely and fraudulently represented that his flavoring extract was of the value of seven hundred and fifty dollars, when it was only of the value of one hundred and fifty dollars; and said defendant, relying upon said representation at the time, issued the policy."

The policy upon which this action was based was not a valued but an open policy. The value at the time of the loss is expressly made the criterion. In a valued policy an over-valuation of the property is material, but in an open policy it is immaterial. In an open policy the company is only liable for the actual value of the property lost. A valued policy is a stipulation for liquidated damages. Phillips Ins., secs. 1178 and 1180; *Harris v. Eagle Fire Co.*, 5 Johns. 368; Bouvier Law Dict. 345; *Cox v. The Aetna Insurance Co.*, 29 Ind. 586. In the case last cited, it is expressly decided that in an open policy an over-valuation is immaterial.

The second paragraph of the answer alleged that the

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plaintiff falsely and fraudulently represented that the value of the property insured was seven thousand five hundred dollars, when it was only worth two thousand five hundred dollars. This was, in substance, the same as the sixth, for under this paragraph the same evidence was admissible as under the sixth. The one was general, while the other was specific in the allegations of over-valuation, but the same evidence was admissible under the one as the other.

This case was, before its trial, consolidated with the case of this appellee against The Germania Insurance Co., and by agreement both were tried together. The jury rendered a general verdict and answers to interrogatories as to the value of each class of property lost, so as to ascertain if the losses covered or equalled the amount of both policies. The reason for the consolidation was, both policies were issued on the same day, in favor of the same person, on the same property, by the same agent, and had the same time to run. After the consolidation they were tried as one case. The general verdict was for five thousand one hundred dollars, but was divided as follows: Germania, two thousand four hundred dollars; Aurora, three thousand one hundred dollars. For these sums judgment was rendered.

It is obvious that the court committed no error in sustaining the demurrer to the sixth paragraph.

The seventh paragraph alleges that the appellee fraudulently stated as to said loss by fire that the whole amount of property owned by him lost in said fire covered by said policy was eight thousand six hundred and sixty-two dollars, when in truth and in fact the whole value of said property did not exceed three thousand dollars, and said plaintiff well knew the same.

It is not alleged that the statement was made to the appellant or her agent, or that the appellant was induced thereby to expend any money or do any act to her injury that she would not have otherwise done.

Nor is it alleged that such statement was made under oath in the schedule required by the policy, nor in the prelimi-

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nary proof, nor in any transaction in relation to the loss. The statement of loss after the fire does not increase the risk. There is no condition in the policy to which the paragraph can apply.

The eighth paragraph is as follows: "That the plaintiff negligently stood by at the time of said loss, and permitted said property embraced in said policy to be consumed and destroyed, and did not make any reasonable exertion to prevent said fire or save said property or any part thereof."

The above paragraph is exceedingly meagre and indefinite in its averments. There are no facts averred, but simply conclusions. It says the appellee negligently stood by. What is meant by standing by? In another portion it avers that he did not make any reasonable exertion to prevent the fire or save the property. It is not averred that he could have prevented the fire or saved the property from loss. If he could have prevented the fire or saved the property from destruction, such conduct would have affected the measure of damages. The use of the word "negligently" will not supply the omission to aver that it was in his power either to prevent the fire or loss of property. In the connection in which it is used, it has no legal meaning, nor does it state a fact.

The condition of the policy is not that defendant will not be liable for any loss, but provides the assured shall use his best endeavors to save, secure, and preserve the property, and if he fails to do so, the insurer will not be liable to pay damages caused by any such neglect.

We think the answer was clearly bad.

The ninth paragraph is as follows: "And for a further answer defendant says, that said insured did not furnish certified copies of bills, invoices, or other papers, lost or destroyed, and did not and would not submit to an examination under oath touching said loss, and would not answer all questions touching such loss, though requested to do so, and which was required by the conditions of said policy."

The eighth condition of the policy is as follows: "And whenever required in writing, the insured shall produce and

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exhibit their books of account and other vouchers in support of the claim, and permit extracts and copies thereof to be made, and also to exhibit to any person named by this company or their agent, and permit to be examined by them, any property damaged or on which any loss is claimed, and that every facility be given them to do so, and the insured, their agent, or clerk shall also, if required, submit to an examination, under oath, by the agent or attorney of this company, and answer all questions touching his, her, or their knowledge of any thing relating to such loss or damage, and subscribe such examination, the same being reduced to writing, and till such proof, examination, declaration, certificates, and exhibition of damaged property are produced and permitted by the claimant when requested as above, the loss shall not be payable."

The eighth condition requires the insured, whenever required in writing, to produce and exhibit their books of account and other vouchers in support of their claim and permit extracts and copies thereof to be made. The paragraph under examination does not aver that the appellee was required in writing to produce such books and vouchers and permit extracts and copies to be made. There was no obligation resting on him to do so until so required in writing.

The next clause of such condition provides that the insured shall exhibit to any person named by the company or their agent, and permit to be examined by them any property damaged or on which any loss is claimed, and shall afford such person every facility so to do. The answer does not attempt to allege a failure to comply with the above condition.

The third clause makes it the duty of the insured to submit to examination under oath by the agent or attorney of the company. The answer avers in a very general way, that the appellee refused to submit to an examination under oath, but it does not aver when, or by whom, the request was made. It does not aver whether the request was made

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within sixty days from the loss, or whether it was before or after the suit was commenced. A demand made after the sixty days and after action brought is a nullity. Nor is it alleged that the request was made by an agent or attorney of the company. None other had the right to require such examination. Nor is any time or place named, when or where such examination was to take place.

We think the answer was bad.

In our opinion, the court committed no error in sustaining the demurrer to the sixth, seventh, eighth, and ninth paragraphs of the answer.

This leaves for our decision the questions arising upon the overruling of the demurrer to the second, fourth, sixth, seventh, and eighth paragraphs of the reply.

The second paragraph was intended as a defence to the matters set up in the paragraph of the answer numbered twelve, which was a substitute for the tenth paragraph. That paragraph alleged that the risk had been materially increased by using the third story of the building insured as a store-room for old boxes, casks, and rubbish. The second paragraph of the reply alleged that the boxes, goods, and materials referred to were materials commonly used and necessary for storing, packing, shipping, and receiving tobacco and carrying on the business of manufacturing, buying, and selling tobacco, and were used in said business and constituted a part of the risk insured against.

The learned counsel for appellant have not pointed out any objection to this paragraph of the reply, and we think none exists. We think it good.

The fourth paragraph of the reply is addressed to the answer numbered ten and one-half, but there is no such paragraph in the record. The record says: "Come the parties and defendant files amended fifth paragraph of answer herein, which reads as follows, to wit: (See page 39, line 20, to page 39, line 30); and a substituted tenth paragraph of answer: (See page 41, line 26, to page 42, line 14); and an additional tenth and one-half paragraph of answer: (See page 42,

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line 15, to page 43, line 4); and an additional twelfth paragraph of answer: (See page 40, line 10, to page 40, line 20). And plaintiff is ruled to reply."

The clerk says the twelfth paragraph is substituted for the tenth, and that the thirteenth is substituted for ten and one-half. But the tenth is in the record, and alleges that the plaintiff failed to give written notice of the loss as required by the policy. The thirteenth alleges that the plaintiff insured in another company without the consent of the defendant. The twelfth is the only paragraph of the answer which alleges that the risk was increased by using the upper story for a store-room, by the adjoining building being used for a printing office, and by another building which was adjoining being used as a carpenter's shop, where doors, window frames, and sash and other inflammable lumber were stored, and that plaintiff failed to give defendant notice. The fourth paragraph of the reply alleged that the printing office was placed in the adjoining building with the knowledge and consent of the local agent of the appellant. The objection to the reply is, that it assumes to answer the whole paragraph of the answer but only answers a part, because no reference is made to the adjoining building being used as a carpenter's shop and for the storage of inflammable lumber. If the reply was addressed to the twelfth paragraph, the objection would be well taken, but it is addressed to ten and one-half, and assumes to be in bar of the entire answer, and as that paragraph is not in the record, we cannot say, and have no right to assume, that it related to any thing but the printing office. There is a reply in denial to the twelfth paragraph of the answer.

Under the facts stated, we cannot say that the fourth paragraph of the reply was bad for assuming to be in bar of the whole paragraph of the answer, when in fact it only constituted a defence to a part of it.

The eleventh paragraph alleges that the plaintiff failed and refused to produce his books and bills of purchase, etc.

The sixth paragraph of the reply alleged, as an excuse for

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such failure, that they were destroyed by the fire. This was a good excuse. The reply was good.

The seventh paragraph of the reply is addressed to the answer numbered ten and one-half, and says that the plaintiff had no knowledge that said adjoining building was used for the storage of inflammable materials. Inasmuch as such paragraph of the answer is not in the record, we cannot determine any thing as to the seventh paragraph of the reply.

The eighth paragraph of the reply is adddressed to the ninth paragraph of the answer. As we have seen, a demur-
rer was correctly sustained to that paragraph of the answer. It is, therefore, wholly immaterial whether the reply was good or bad. But we presume it was really intended for a reply to the tenth paragraph, which alleges that the certificate of the loss was improperly certified. It was certified by a notary public, instead of by the nearest magistrate. The reply alleged that the defendant was a foreign insurance company, and that a certificate by the nearest magistrate was no longer required by the statute.

The sixth section of the act of December 21st, 1865, regulating foreign insurance companies, provides, that "no such insurance company shall insert any condition, in any policy hereafter issued, requiring the insured to give notice forthwith, or within the period of time less than five days, of the loss of the insured property; nor shall any condition be inserted in such policy, requiring the insured to procure the certificate of the nearest justice of the peace, mayor, judge, clergyman, or other official, or person, of such loss, or the amount of such loss; and any provision or condition contrary to the provisions of this section, or any condition in said policy, inserted to avoid the provisions of this section, shall be void, and no condition or agreement, not to sue for a period less than three years, shall be valid." 3 Ind. Stat. 315.

The policy upon which the action is founded was executed on the 10th day of March, 1871, and consequently was gov-

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erned by the provisions of the above quoted section. Under such section, the reply was good.

We have thus gone through the entire record and have examined and passed upon every question arising in the record, and have reached the conclusion that no such error intervened as would justify us in setting aside the verdict of the jury and the judgment of the court below and awarding a new trial.

The judgment is affirmed, with costs.

THE GERMANIA INSURANCE COMPANY *v.* JOHNSON.

From the Jefferson Circuit Court.

J. Y. Allison and *W. S. Friedley*, for appellant.
H. W. Harrington and *C. A. Korbly*, for appellee.

BUSKIRK, J.—This case is in all its legal aspects the same as the case of *The Aurora Insurance Co. v. Johnson*, ante, p. 315; and upon the ruling in that case the judgment in the present is affirmed.

The judgment is affirmed, with costs.

STEWART *v.* HARTMAN ET AL.

CONSTITUTIONAL LAW.—*Private Way*.—The law for the establishment of private ways, for the benefit of one man over the lands of another, is unconstitutional.

PRIVATE WAY.—*Public Highway*.—If a way is petitioned for and damages assessed as for a private way, and the order of the board of commissioners

46	331
128	120
46	331
139	295
46	331
149	217

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made for a private way, the way cannot be sustained on the ground that it is a public highway.

WAY OF NECESSITY.—A way of necessity derives its origin from a grant, and cannot legally exist where neither the party claiming the way, nor the owner of the land over which it is claimed, or any one under whom they or either of them claim, was ever seized of both tracts of land.

ESTOPPEL.—*Private Way.*—The receipt of damages assessed in proceedings before county commissioners for the opening of a private way will not estop the person receiving the same from resisting the opening of the way over his lands, where the money is accepted under a mistake as to the amount of work that will be done in opening the way by the person for whose benefit it is proposed to be opened.

From the Elkhart Circuit Court.

J. H. Baker and J. A. S. Mitchell, for appellant.
W. A. Wood and R. M. Johnson, for appellees.

DOWNEY, J.—This was an action by the appellant against the appellees for trespass on real property. It is alleged in the first paragraph of the complaint, that on the 1st day of September, 1872, and on divers other days and times between said date and the commencement of this suit, the defendants, with force and arms, wrongfully and unlawfully broke open, and with horses, wagons, and other vehicles, entered into and upon the plaintiff's close, situate in the county of Elkhart, etc., to wit, the north-east quarter of the north-west quarter of section thirty-four, in township thirty-six, north of range five east; and the defendants and their servants then and there broke down, opened, destroyed, and carried away the plaintiff's gates then and there on said premises being, and then and there, on the days and times aforesaid, with cattle, horses, hogs, and sheep, ate up, depastured, trod down, and destroyed the grass, wheat, and herbage of the plaintiff, then and there on said premises growing, and subverted the soil; and then and there, on the days and times aforesaid, by means of breaking and leaving open the said close, the said defendants have greatly encumbered the same and prevented this plaintiff from having and enjoying the same in so full and ample a manner as he otherwise might; by means of which said wrongful acts and doings of said

defendants the plaintiff is damaged in the sum of two hundred dollars ; wherefore, etc.

In the second paragraph, it is stated that the plaintiff is seized of the lands described in the first paragraph, and they are described as in that paragraph ; that he is seized and possessed thereof as tenant from year to year. It is then stated that Adam W. Hartman gave notice and filed a petition before the county commissioners, praying for a private way over said lands, procured appraisers of damages to be appointed, upon whose reports at the December term, 1870, the commissioners granted a private way to and for the use of said Adam W. Hartman, one rod in width, along and over said lands, on the condition that he should open and repair the same as required by law ; that the defendants immediately after the granting of said private way as aforesaid, and without opening said private way by fencing or otherwise separating the same from the residue of said close, which was and is under cultivation for farming purposes, unlawfully and wrongfully broke down the fence around said close, and suffered and permitted his said close to remain open and exposed for a long time, to wit, one month ; and that for the purpose of protecting his said close, and affording to the defendants good and convenient ingress and egress through and over the said private way until the defendants should open and fence said private way, the plaintiff caused to be erected at the *termini* of said proposed private way good and convenient swinging gates, provided with good and convenient means for opening and fastening the same ; but plaintiff says that, notwithstanding the premises, the said defendants unlawfully and wrongfully, with teams and vehicles, broke into and left open the close of the plaintiff, and from the 1st day of August, 1872, continuously until the commencement of this suit, and at divers days and times before and since said date, the said defendants have unlawfully and wrongfully broken into and left open the said gates, and have, with cattle, horses, hogs, and sheep, subverted the soil, and trod down, ate up, depastured, and damaged the

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pasturage, wheat, corn, oats, and other herbage then and there growing, etc., and have, on, etc., with teams, etc., broken into said close, and broken down and carried away the plaintiff's gates; by means whereof the plaintiff is and has been deprived of, etc., is compelled to keep watch, etc., over his close, which is now seeded in wheat, and has been compelled to drive out cattle, etc., which enter his said close, and to watch and shut the gates so left open, etc.; whereby he has lost one month's time, of the value of fifty dollars; and by reason of which acts he has been damaged two hundred dollars; that the defendants pass through said gates nearly every day, and sometimes several times each day; that he has his field in wheat, leaving a passage way of eighteen feet; that the defendants declare that they will not permit said gates to remain, and will not allow them to remain closed, and have threatened violence to the plaintiff and his servants for undertaking to keep said gates closed; and that said Adam W. Hartman has appeared and remained from time to time on said way, and with a gun, with the purpose and intention, as plaintiff is informed and charges, of preventing the plaintiff and his servants from protecting his close and keeping said gates shut; that unless the defendants are restrained from destroying the plaintiff's gates, and from leaving and continuing them open, etc., great and irreparable injuries will result to him pending the litigation in this behalf, for which he has no adequate remedy at law, etc. Prayer for a temporary restraining order, for a perpetual injunction on the final hearing, and for two hundred dollars in damages.

The complaint is verified by the oath of the plaintiff, and with the second paragraph there is filed a copy of the proceedings before the county commissioners for the laying out, etc., of the private way.

A temporary restraining order was granted, at chambers, to continue until the second day of the next term.

A demurrer to the second paragraph of the complaint, on the ground that the same did not state facts sufficient to

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constitute a cause of action, was filed by the defendants and overruled by the court.

The defendants then answered, first, by a general denial, and, second, that the said Adam W. Hartman is the owner, and seized in fee of, to, and in, the east half of the south-west quarter of section thirty-four, in township thirty-six, north of range five east, in said county of Elkhart; that he purchased the same as a home for himself and family, and has made valuable improvements thereon, etc.; that defendant with his family, of which said Moses, one of the defendants, is a member, reside in the dwelling-house on said land; that the most suitable and eligible place for a dwelling and other houses and necessary buildings on said farm was and is near the north-east corner of said tract of land, near the center of the section; that there is no public highway running by, to, or near the said dwelling-house of the defendant Adam W. Hartman; that there is a public highway on and along the north and east sides of said section, but none on the south of nor through said section; that a large part of the said south-west quarter of said section is wet, swampy, and low land, taken up by what is known as Yellow Creek Lake, which is so situated, with the wet and swampy lands adjoining, as to render it almost an impossibility to make a road passable leading from the dwelling-house of the defendant Adam W. Hartman to the road, or public highway, running along the west side of said section; and that the obtaining of a road leading from the said dwelling-house to the public highway along the east side of said section is prevented by the situation and location of the buildings and appurtenances belonging to and owned by one Downer, who occupies the tract of land between the land of said Hartman and said highway; that being thus situated, and living and residing near the center of said section, and being refused a passage-way over the lands of adjoining owners to the public highway, and having no means of ingress or egress to and from his said residence, and hence, from and to said highway, except by trespassing upon the lands of his neighbors, as

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will more fully appear by a map of said section filed and referred to, the defendant Adam W. Hartman did, on the 10th day of August, 1870, give notice, etc. The paragraph then states the various steps taken to have the private way laid out and opened, and a copy of the record of that proceeding is made part of the paragraph. It is averred in the paragraph that James Stewart, the present owner of the land, in the plaintiff's complaint described, under whom plaintiff holds, asked to have his damages assessed on account of said way; that his damage was assessed at thirty dollars; that Adam W. Hartman deposited that sum in the county treasury to his credit, and that he afterward received and receipted for the same.

It is further stated, that after the granting of the said way the said Adam W. Hartman proceeded to open and work said road, as described in the petition and required by law, and has ever since kept the same in repair; that the road as granted, for one hundred and twenty rods, ran through heavy timber land, and said Hartman was at great expense, to wit, five hundred dollars, in the opening and working of said road; that he notified said James Stewart to fence said road where it runs over his said lands, etc.; that for a year said James Stewart and said plaintiff did permit said tract of land over which said road runs, to lie open to the commons, uncultivated and untilled, and neglected and still neglect to fence the same along said road; that by order of the board of commissioners of said county, a copy of which is filed, certain animals are allowed to run at large. It is then alleged that the plaintiff and said James Stewart, after the plaintiff had opened and worked said road as stated, and after the use of the same for more than a year by the defendants, by said James Stewart and the plaintiff, and by the public, and in the months of September and October, the plaintiff erected gates, etc., for the purpose of preventing these defendants and the public from using the said road; that the defendants notified the plaintiff and said James Stewart to remove the obstructions, so that the road might be used by them and

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the public; and the plaintiff and said James Stewart failing to do so, the defendants, for the purpose of using said road and keeping the same open to the use of the public, did enter upon said road, etc., and remove said obstructions, etc., and have since continued to keep said road open and in repair for the use of themselves and the public, as required by law. They allege that the road, though granted on the petition of Hartman, is of public utility and a public benefit, as well as for the private accommodation of said Hartman. They deny having entered upon the lands of the plaintiff, or in any way injured the same or his crops, etc., except in the exercise of the right so granted to them. The receipt of James Stewart for the thirty dollars damages assessed in his favor is dated January 16th, 1871.

The plaintiff replied, first, by a general denial of the second paragraph of the answer, and, second, that before the expiration of thirty days from the date of the granting of said private road, and before this plaintiff or his lessor had accepted and received the damages assessed, the defendants' attorney, John W. Irwin, in the presence of the defendants, informed this plaintiff and his lessor, that it was incumbent on the defendants by the law regulating proceedings in that behalf, to fence the said road on both sides, parallel with said private road, and then and there informed this plaintiff and his lessor that the defendants would fence the said road; and that the said attorney at the time advised and instructed the appraisers that they should not include in their appraisement of damages anything for fencing the said private way; and that being so instructed, the said appraisers did not include anything in their appraisement for fencing the said private road; and he says that being so instructed by the defendant's attorney, and the defendants promising and agreeing that if the plaintiff and his lessor would take the damages so assessed, and not appeal therefrom, they would fence said road, this plaintiff did accept the damages so assessed; that had it not been for the information and agreement afore-

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said, upon which the plaintiff relied, he would not have accepted the said damages, or consented to the said order, but would have appealed therefrom within the time allowed by law, all of which was well known to the defendants.

The defendants demurred to the second paragraph of the reply, on the ground that the same did not state facts sufficient to constitute a reply. This demurrer was overruled by the court. Thereupon the cause was submitted to the court for trial of the issues upon an agreed statement of facts, as follows :

" 1. It is agreed that the plaintiff is and has for five years last past been in possession of the lands and tenements in the complaint described, as tenant from year to year, and that the gates mentioned in the complaint were put there at his own expense, and that if any cause of action exists in reference to the subject-matter complained of in his complaint, it exists in favor of the plaintiff.

" 2. It is agreed that the defendant Adam W. Hartman took the steps prescribed by the statute for the procuring of a private road, and that he has acquired all the rights in, to, and over the land in question, which accrued to an individual for whose benefit a private road is located, under the statute in force in the State of Indiana in the month of December, 1870; and it is further agreed, that the rights of the plaintiff are subject to any and all rights which the said Hartman or the public have, by force of the statute or other law in force at the time in the State of Indiana, acquired in, to, and over said lands, on account of the location of said private road as aforesaid; and the copy of the proceedings before the board, as contained in the answer, is made part of this agreement. It is agreed that after the order establishing said road, and after paying into the county treasury the damages assessed, said Hartman proceeded to open and did open said road at his own expense over plaintiff's said lands, making the same through forest and woodland for the distance of one hundred and forty rods; the balance of the way, twenty rods, being through plaintiff's field, and over

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this the road was opened by making gaps in the plaintiff's fence on either side, thereby opening said field to the public commons; and in this condition defendant kept open and used said road for eighteen months, and until about the 1st day of September, 1872, when plaintiff, being desirous of using and tilling said field, erected the gates hereinafter named.

"3. It is agreed, that upon the petition of this plaintiff's landlord, appraisers were appointed to appraise the damages which should be sustained on account of the granting of said private way; and it is further agreed, that by the direction of John W. Irwin, who was at the time the attorney for said defendant Hartman, in the matter of procuring said private road, the appraisers appointed to appraise the damages of this plaintiff's landlord were instructed that the law required the said Hartman to maintain a fence parallel with said private road, on both sides thereof, and that by reason of such instructions the appraisers excluded from their appraisement anything for fencing said road. It is agreed that this plaintiff's landlord accepted the damages as appraised, he being informed by the attorney aforesaid, and believing that under the law it was incumbent on the said Hartman to fence the said road as aforesaid. The instructions and opinion so given by said Irwin to said appraisers and to plaintiff's lessor were given without the knowledge or consent of the said Hartman; but said Hartman was advised by said Irwin that under the law it was incumbent on him to fence said road. This information and advice of said Irwin, so given to the various parties, can have no binding force on said Hartman, except such as the law gives them on account of their coming from his attorney. It is further understood that the facts set forth in this clause are not to be considered, unless the same are competent and legal testimony under the issues made in the case, and in connection with the other facts herein agreed upon.

"4. It is agreed that the said defendant Hartman did not fence said road, and that he now, and ever since the opening of said road, denies his liability to fence the said road.

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"5. That it is agreed that this plaintiff tilled the field through which the said road passes, and that he made swinging gates of ordinary convenience at the *termini* of said road, in order to protect his close.

"6. It is agreed that the defendants took down and removed said gates, and that the said Hartman now declines and refuses to allow or permit the same to be maintained on the ground; that the plaintiff has no legal right to maintain gates of any kind at the *termini* of said road, or at any point along and across said road.

"7. It is agreed, that by reason of the taking down, leaving open, and carrying away of the said gates by the defendant, the plaintiff has suffered damages in the sum of twenty dollars, if upon the case made he is entitled to damages in any sum.

"8. It is agreed that if, upon the foregoing statement of facts, the law is with the plaintiff, he shall recover of and from the defendants twenty dollars, besides his costs, and that the defendants, and each of them, be perpetually enjoined from removing, destroying, or otherwise unreasonably leaving open the said gates until they shall properly fence said road.

"9. It is agreed that if the law is with the defendants, upon the foregoing facts, they recover their costs, and that the plaintiff be enjoined to remove the said gates, and from erecting or maintaining any gates across said road, or in any other manner obstructing the same."

The agreement is duly signed.

On this statement of facts, the court found for the defendants. The plaintiff moved for a new trial, on the ground that the finding was not sustained by sufficient evidence, and was contrary to law. This motion was overruled. The plaintiff then successively moved for a judgment in his favor *non obstante veredicto*, and in arrest of judgment, which motions were both overruled.

The evidence, consisting of the said agreement of facts, is put in the record by a bill of exceptions.

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The appellant has assigned as errors: 1. Overruling the motion for a new trial. 2. Overruling his motion for judgment *non obstante*. 3. Overruling his motion in arrest of judgment.

The appellees have assigned as cross errors: 1. The overruling of their demurrer to the second paragraph of the complaint; and, 2. Overruling their demurrer to the second paragraph of the reply.

On each side there is an able and well prepared written brief.

It has already been decided by this court, that the law for the establishment of private ways for the benefit of one man over the lands of another is unconstitutional. *Wild v. Deig*, 43 Ind. 455. This decision was not made at the time this case was decided in the circuit court. We need not further examine this question.

The road in question in this case was a private way, and not a public highway. In the application for it, the petitioner asked for "a private way;" for such a way the damages were assessed, and for such a way the order of the board of commissioners was made. It cannot, therefore, be sustained on the ground that it is a public highway. It is a mere *cul de sac*. It cannot be a highway, for another reason; it was only one rod wide, while, by statute, no county road can be less than thirty feet wide, and no township road less than twenty-five feet wide. 1 G. & H. 365, sec. 39.

We do not think the facts justify the conclusion that the way was a way of necessity in this case. Mr. Washburn says: "A way of necessity can only be raised out of land granted or reserved by the grantor, but not out of the land of a stranger. For if one owns land to which he has no access except over lands of a stranger, he has not thereby any right to go across these for the purpose of reaching his own." 2 Washb. Real Prop. 282, 3d ed.

Kent says: "Sergeant Williams is of opinion, that the right of way, when claimed by necessity, is founded entirely

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upon grant, and derives its force and origin from it. It is either created by express words, or it is created by operation of law, as incident to the grant; so that, in both cases, the grant is the foundation of the title. If this be a sound construction of the rule, then it follows, that, in the cases I have mentioned, the right of the grantor to a way over the land he has sold, to his remaining land, must be founded upon an implied restriction, incident to the grant, and that it cannot be supposed the grantor meant to deprive himself of all use of his remaining land. This would be placing the right upon a reasonable foundation, and one consistent with the general principles of law." 3 Kent Com. 423, original paging.

Blackstone says: "A right of way may also arise by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it; and I may cross his land for that purpose without trespass." 2 Bl. Com. 36, star paging. In the same place, Mr. Chitty, in his notes, says: "A way of necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant, for there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant; and of course it is as necessary to set forth the title to a way of necessity as it is to a way by express grant."

There cannot legally exist a general way of necessity without reference to the manner whereby the land over which the way is claimed became charged with the burden. In the case under consideration, it is not shown, that either of the parties, or any one under whom they or either of them claims, was ever seized of both tracts of land; and consequently the claim set up by the appellant to a way of necessity can have no valid foundation.

What is the effect of the receipt by James Stewart, the lessor of the plaintiff, of the thirty dollars assessed in his

Brown v. Duke.

favor for damages resulting to him from the opening of the private way? We think it cannot, under the circumstances disclosed, operate as an estoppel. It is clear that the damages assessed in his favor were not as much as they should have been by the cost of fencing the way, in consequence of the representations of the attorney of Hartman. Had Hartman done as his attorney represented that he would be bound to do and would do, this controversy would probably never have arisen. We are unwilling to apply the doctrine of estoppel in favor of Hartman, to give him a right which, according to the evidence, he ought not to have on the terms upon which he claims it. Estoppels are applied to prevent fraud, and not to give a party an unfair advantage of his adversary. *Fletcher v. Holmes*, 25 Ind. 458.

We have thus, we think, disposed of all the questions presented by the assignment of errors and cross errors.

We need not decide the question whether or not a party obtaining a private way, under the statute, is required to fence the way as a part of the expense of opening it and keeping it in repair, since the statute is held to be invalid.

The judgment is reversed, with costs, and the cause remanded, with instructions to render judgment for the plaintiff, according to the agreement in the record.

BROWN v. DUKE.

COSTS.—*Appeal From Justice of the Peace.*—Where an action for taking and converting personal property has been tried before a justice of the peace, and has been appealed to the circuit court by the defendant, and it is there tried, and the judgment is reduced more than five dollars, if the defendant appeared before the justice, he is entitled to recover his costs in the circuit court.

From the Morgan Circuit Court.

Brown *v.* Duke.

W. R. Harrison and W. S. Shirley, for appellant.

C. F. McNutt and G. W. Grubbs, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellant.

It is alleged in the complaint that the defendant did, on etc., unlawfully take from the plaintiff and out of the plaintiff's possession eleven hundred fencing rails of the value of twenty-two dollars, and unlawfully convert said rails to defendant's own use. The action was commenced before a justice of the peace, where judgment was rendered in favor of the plaintiff for seven dollars and costs. The defendant appealed to the circuit court, where judgment was rendered in favor of the plaintiff for one cent damages. The defendant thereupon moyed the court to tax the costs in the circuit court against the plaintiff, for the reason that the judgment of the court below was reduced more than five dollars. The court overruled this motion, for the reason that the title to real estate was in question, to which ruling the defendant excepted. The court thereupon rendered judgment for full costs in favor of the plaintiff. This ruling of the court is assigned as error. Counsel for appellant rely upon section 70, p. 597, 2 G. & H., which is as follows: "Costs shall follow judgment," etc., "on appeals with the following exceptions: 1st. If either party against whom judgment has been rendered, appeal and reduce the judgment against him five dollars or more, he shall recover his costs in the court of common pleas, or circuit court, when the appellant appeared before the justice," etc. The court seems to have been governed by sec. 396, p. 225, 2 G. & H., which provides, that "in all civil actions the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law;" and sec. 398, p. 227, 2 G. & H., which provides, that "in all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages, except in actions for injuries to character and false

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imprisonment, and where the title to real estate comes in question."

In our opinion, the ruling of the court cannot be sustained. The object of the section of the statute first quoted was to discourage appeals from justices of the peace to the higher courts where the judgment of the justice of the peace was correct or nearly correct in amount. Whether the title to real estate came in question or not on the trial in the circuit court, could not, in this case, affect the question as to the right to costs. The defendant having appeared before the justice of the peace, and, having on appeal reduced the judgment more than five dollars, was entitled to recover his costs in the circuit court. *Castle v. House*, 41 Ind. 333.

The judgment, as to costs, is reversed, with costs, and the cause remanded, with instructions to render judgment in favor of the plaintiff for the one cent damages and his costs before the justice of the peace, and in favor of the defendant for his costs in the circuit court.

SHORE *v.* TAYLOR.

HUSBAND AND WIFE.—A wife is liable for her debts contracted *dum sola*, and the husband, though not liable as at the common law, is liable by statute on account of the property he may have received with or through the wife, and to the extent of its value; and in a suit against the husband in such a case, the wife should also be a party defendant.

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PRACTICE.—Defect of Parties.—An objection for a defect of parties defendants must be taken by demurrer or answer, or it will be considered as waived.

SAME.—Demurrer.—A demurrer must be well taken as to all those uniting in it, otherwise it should be overruled as to all of them.

SAME.—Assignment of Errors.—That a verdict is contrary to law, that it is not supported by sufficient evidence, or that it is excessive in amount, is good cause for a new trial, but is not a proper assignment of error. An assignment of

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error that the court below erred in overruling a motion for a new trial brings all those matters before the appellate court, if they were embraced in the motion for a new trial.

SAME.—*New Trial.*—Supposed errors of law occurring at the trial must be particularly stated in the motion for a new trial. The requisite particularity cannot be supplied by reference to a bill of exceptions to be thereafter made.

From the Henry Circuit Court.

J. Brown and J. M. Brown, for appellant.

M. E. Forkner, E. H. Bundy, and L. P. Mitchell, for appellee.

DOWNEY, J.—Suit by Eleanor Taylor against William Shore and Martha Shore. It is alleged in the complaint that in 1871 the defendant Martha Shore, then sole and unmarried, became indebted to the plaintiff in the sum of six hundred dollars for work and labor, care, and attention theretofore rendered her by the plaintiff, at her special instance and request, a bill of particulars of which is filed with the complaint. It is further alleged that said Martha, at that time, was the owner of a large amount of personal property, to wit, to the value of eight hundred dollars; that after the accruing of said indebtedness, said Martha intermarried with said defendant William Shore, and that they yet remain husband and wife. It is also stated that said Martha turned over and gave to said defendant William, after the said marriage, all of said personal property, and that the said William received through her as aforesaid the said personal property, of the value of eight hundred dollars, as aforesaid; that she is now wholly insolvent, she having given said defendant all of her property as aforesaid; wherefore the plaintiff says the defendant William Shore became liable to pay said plaintiff said indebtedness, and that the same is due and unpaid; wherefore the plaintiff demands judgment against said William for six hundred dollars.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was overruled.

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William Shore then answered, 1. A general denial. 2. Payment by the said Martha before said marriage. 3. That on the 1st day of November, 1870, two days before the said marriage, the said Martha and the plaintiff accounted with each other and settled all their claims and demands existing between them, and a balance was then struck in favor of the plaintiff, of sixty-five dollars and fifty cents, which sum the said Martha then paid to the plaintiff and took her receipt in full of said account, a copy of which is filed with the answer. 4. Set-off of an account in favor of said Martha to the amount of five hundred dollars. 5. Set-off of an account in favor of said William Shore in the amount of five hundred dollars. 6. That the cause of action did not accrue within six years next before the commencement of the action. Reply in denial of the second, third, fourth, fifth, and six paragraphs of the answer.

The jury which tried the cause found a general verdict for the plaintiff in the sum of four hundred dollars, and answered interrogatories, as follows:

"1. Did William Shore receive any money or property by gift from his wife? If so, what amount of money or what articles of property and the value of the same?

"Answer. He did, viz., cash on note, value of two hundred and seventy dollars; two horses, one hundred and eighty dollars; one wagon, sixty dollars; cow, twenty-eight dollars; plow and harness, twenty dollars."

A motion for a new trial for the following reasons was made by the defendant: 1. The verdict is not sustained by sufficient evidence, and is contrary to law. 2. The verdict is contrary to the evidence. 3. Because the amount of the finding of the jury is too large. 4. The evidence does not sustain the finding of the jury. 5. Because the court refused to allow the jury to answer interrogatory number one, on motion of the defendant, as shown by the bill of exceptions. 6. Because the court gave to the jury charge No. —, as shown in the bill of exceptions. 7. Because the court refused to give to the jury charges —, as shown by the

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bill of exceptions. 8. Because the court admitted certain rebutting testimony to be given by the plaintiff, over the objections of the defendants, as shown in the bill of exceptions. This motion was overruled by the court, and final judgment was rendered on the verdict.

The following are the errors assigned: 1. Overruling the motion for a new trial. 2. Giving instruction one, and refusing to give two, three, four, and five, as shown in the bill of exceptions. 3. Admitting the plaintiff's rebutting evidence on the subject of the receipt, as shown in the bill of exceptions. 4. Refusing to allow the jury to answer interrogatory number one, as shown in the bill of exceptions. 5. Overruling the demurrer to the complaint. 6. The complaint is defective, in this, that it does not make Martha Shore a defendant or party to the action, whilst the liability of her husband, if he be liable at all, is but secondary, after exhausting the wife's means. 7. The court erred in rendering judgment against the defendant below.

It is plain that there has been neither skill nor care used in the management of this case from the commencement till the present time. The complaint properly unites the husband and wife as defendants, and shows a cause of action against both of them, but concludes by praying for judgment against the husband alone, alleging the insolvency of the wife. The wife is clearly liable to pay the debt contracted *dum sola*, while the husband, though not liable as at common law, is liable by statute on account of the property received from his wife, and to the extent of its value. 1 G. & H. 373, sec. 1. Why it should have been supposed that because the wife was insolvent, it became necessary or proper to ask judgment against the husband alone, we do not see. The demurrer to the complaint was by both of the defendants jointly, and, we think, for this reason, was properly overruled. The husband had a right to complain, if any one, that the wife was not united in the prayer for judgment. She can not complain that judgment was not asked against her. A demurrer must be well taken as to all those uniting in it,

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or it should be overruled as to all of them. *Estep v. Burke*, 19 Ind. 87; *Teter v. Hinders*, 19 Ind. 93. Conceding that the failure to ask for judgment against the wife was ground of demurrer as to the husband, which we need not decide, still it was not an objection which the wife could urge, and under the joint demurrer was not good as to either. So much as to the fifth assignment of errors, which alleges the improper overruling of the demurrer to the complaint.

The sixth assignment of error, alleging a defect of parties because Martha Shore was not made a party, presents an objection which can not be made in this manner and at this stage of the case. Such an objection, when not taken by demurrer or answer, is waived. 2 G. & H. 81, sec. 54.

There is nothing, that we can see, in the seventh assignment of error. If there was no reason shown why a new trial should have been granted or the judgment arrested, it was the duty of the court to render the proper judgment on the verdict.

The second, third, and fourth assignments of error may be reasons for a new trial, but they can not be assigned as errors.

Under the first assignment of errors, we must look to the reasons for a new trial, as stated in the motion of the defendant, which we have already set out.

As to the sufficiency of the evidence to sustain the verdict of the jury, we think there can be no reasonable question. It shows the services rendered by the plaintiff, and shows that the defendant received the amount of personal property and money in consequence of his marriage; that his wife was of feeble mind and infirm health, and that he used the property and money as his own. He is held "liable for the debts and liabilities of the wife contracted before marriage, to the extent of the personal property he may receive with or through her, or derive from the sale or rent of her lands, and no further." 1 G. & H. 373, sec. 1. He is not liable merely because he marries a woman who owns property, for the property by law remains her own, and it was not the intention of the legislature to render him liable, except to

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the extent of the property or means he might have received by or through her. *Hetrick v. Hetrick*, 13 Ind. 44. The personal property of the wife held by her at the time of her marriage, or acquired during coverture by descent, devise, or gift, remains her own property, and her husband can not be charged with her debts contracted while sole, unless he receives such property with or through her. In this case it appears that the husband received the money and property of the wife as found by the jury. We can not say that the amount of the verdict of the jury is too large.

The fifth, sixth, seventh, and eighth reasons for a new trial can not be examined. They refer to the bill of exceptions for the certainty and particularity which should have been stated in the motion. The bill of exceptions was not yet made when the motion was presented, and to refer to a bill of exceptions afterward to be made for particulars and certainty can not be allowed. The court below is entitled to a fair degree of certainty in stating the reasons for a new trial. This particularity and certainty can not be supplied by a reference to a bill of exceptions afterward to be made, nor by assigning as error what ought to be stated in the motion as a reason for a new trial.

The judgment is affirmed, with costs.

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REEVES ET AL. v. PLOUGH.

PRACTICE.—*Motion for Leave to Issue Execution.—Pleading to Such Motion.*—

Upon a motion for leave to issue execution upon a judgment after the lapse of ten years from its rendition, the judgment defendant may appear, and in answer to the motion plead payment or satisfaction of the judgment; but whether he appear or not, no execution can issue unless it be established by the oath of the judgment plaintiff, or other satisfactory proof, that the judgment or a part thereof remains unpaid.

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SAME.—*Decision Doubted.*—The case of *Plough v. Reeves*, 33 Ind. 181, doubted, so far as it was held therein that on a motion for leave to issue execution, no pleading was contemplated, and the hearing should be summary.

SAME.—*Payment or Satisfaction of Judgment.*—Under an answer to a motion for leave to issue execution after the lapse of ten years, denying that the judgment is unpaid and pleading affirmatively that it has been paid and satisfied, the judgment defendant may show that it has been satisfied in consequence of the judgment plaintiff having received money on collaterals, or show that by negligence and failure to collect collaterals he has become chargeable with their amount.

PLEADING.—*Former Adjudication.*—To a complaint by a judgment defendant, to have a judgment declared satisfied, it is a good answer on the part of the judgment plaintiff, that the same matters alleged in the complaint were set up in an answer to a motion for leave to issue execution on the judgment, and that such matters were in that proceeding adjudicated.

From the Howard Circuit Court.

J. W. Robinson, for appellants.

M. Bell and A. S. Bell, for appellee.

DOWNEY, J.—From the report of the decision of this case when it was in this court before, in 41 Ind. 204, it appears that it was a proceeding instituted by the appellee against the appellants, to have satisfaction of a judgment ordered, which had been rendered in favor of the appellants against the appellee, as authorized by 2 G. & H. 220, sec. 377. The motion was in the form of a regular complaint, the first and second paragraphs of which had been stricken out and the cause tried on an issue on the third paragraph formed by a general denial. The judgment was reversed by this court, and the cause remanded for a new trial. Upon the return of the cause, the common pleas having been abolished, and Hon. C. N. Pollard, counsel for Plough, having been elected judge of the circuit court, Hon. John U. Pettit, judge of the Twenty-seventh Judicial Circuit, was called to preside and dispose of the cause. A new trial having been ordered according to the mandate of this court, on motion of the plaintiff, he was permitted to file a new first and second paragraph of his complaint. The original judgment was rendered on the 10th day of April, 1857. The third paragraph alleged that the judgment had been paid, without stating

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the manner of payment. The amended first paragraph alleges that at the time of the rendition of the judgment, the defendants herein held a large amount in collaterals placed in their hands by the plaintiff herein, sufficient to pay the judgment and costs, and a reasonable attorney's fee for collecting the same, and which have since been collected; that the judgment is satisfied, etc. The amended second paragraph is the same as the first, except that it alleges a failure on the part of the appellants to collect the collaterals and satisfy the judgment, which they might have done.

The defendants demurred to each of the paragraphs of the complaint, and their demurrer was overruled.

They then answered as follows: 1. The general denial. 2. That in said common pleas court, at the February term, 1869, in answer to a notice and motion for an execution on the said judgment, the plaintiff set up and alleged the same identical matters that are set up and alleged in the complaint in this case, which were adjudicated and found in favor of the defendant herein, and an execution awarded on the judgment. A copy of the notice and motion for execution, the answer thereto, and the judgment of the court are filed with the paragraph of the answer. The plaintiff demurred to the second paragraph of the answer, on the ground that it did not state facts sufficient to constitute a defence to the action, and his demurrer was sustained by the court. A trial by jury resulted in a verdict for the plaintiff on the first and third paragraphs of the complaint, and after overruling a motion for a new trial, the court ordered that the judgment referred to in the complaint be satisfied, etc.

Various errors are alleged, and among them the sustaining of the demurrer to the second paragraph of the answer of the defendants.

The statute provides that after the lapse of ten years from the entry of judgment, an execution can be issued only on leave of court upon motion, after ten days personal notice to the adverse party, unless he be absent or non-resident, or

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can not be found, when service of notice may be made by publication, as in an original action, or in such other manner as the court may direct. Such leave shall not be given, unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unpaid. 3 Ind. Stat. 245, sec. 406 as amended.

We construe this statute to mean that the judgment defendant, in answer to the notice and motion, may appear and plead payment or satisfaction of the judgment, but whether he appear or not, no execution can issue unless it be established by the oath of the judgment plaintiff or other satisfactory proof that the judgment, or some part thereof, remains unpaid. If the defendant in the judgment could not plead and prove payment of the judgment, there would be little use in giving him notice of the motion. In *Plough v. Reeves*, 33 Ind. 181, the court said, in a similar proceeding between these parties: "No pleadings are contemplated or required in a proceeding of this kind. It is a simple motion, to be heard by the court, in a summary way; the only question being whether the judgment, or any part thereof, 'remains unsatisfied and due.'" We doubt the correctness of this ruling. But we need not overrule the case to sustain the second paragraph of the answer in the case at bar. If it was erroneous to allow an issue to be formed as to whether the judgment had been satisfied or not, the finding and judgment were not void or invalid. But it is contended by counsel for the appellee that the matters alleged in the second paragraph of the complaint, as a satisfaction of the judgment, could not have been proved under the answer in the application for leave to issue execution. We do not think this position can be sustained. The second paragraph of the complaint in the case under consideration, after stating the recovery of the judgment, alleges, "that said judgment is fully satisfied, and ought to so appear upon the record, but that it does not, for that at the time of the rendition thereof the said defendants had and held a large amount in

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collaterals, consisting of," etc., "placed in the hands of said defendants by said plaintiff, which the said defendants were to collect and apply upon the aforesaid judgment," etc. After giving an excuse for not stating the amount of the collaterals or giving a description of them, stating that the amount exceeded the amount of the judgment and costs and attorney's fees for collecting the same; that the collaterals were upon good and solvent men, and all collectible; that it was agreed between the parties that the defendants were to promptly collect the same and apply the proceeds thereof to the satisfaction of the judgment, it alleges, that "the defendants have failed to account for said collaterals in any way, although requested so to do; that they have failed and refused to satisfy said judgment; that they have failed to comply with their aforesaid contract, in this, that they did not collect said collaterals and satisfy said judgment as by said agreement provided, but kept and converted the same to their own use and benefit, which were of the value of five hundred dollars," etc. In the first paragraph of the answer to the motion for execution, the plaintiff herein answered as follows :

"Comes now said defendant in the above entitled cause, and for answer to the motion for leave to issue execution, says that as to the allegation of a judgment having been rendered against him, he admits the same to be true, but as to the allegation that said judgment has not been paid off or fully satisfied, and now remains properly in full force, he denies each and all of said allegations."

The second paragraph of the answer was as follows :

"And defendant, further answering herein, says that said judgment set forth in plaintiff's motion was fully paid and satisfied by this defendant to said plaintiff before the filing of said motion or the issuing of process thereon; wherefore," etc.

These paragraphs, pleaded to a notice and motion which alleged that the judgment remained "due and wholly unpaid," formed an issue under which, we think, all the matters set

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up in the complaint, in this case, might have been given in evidence. The question was, whether the judgment had been "paid and satisfied," or whether it remained "due and unpaid." The manner of its satisfaction was matter of evidence. Whether it had been satisfied in consequence of the judgment plaintiffs having received the money on the collaterals, or having by their negligence and failure to collect them become chargeable with their amount, in either case the issues were broad enough to justify the proof. It may be remarked in this connection that the jury found for the defendants as to the second paragraph of the complaint. When and under what circumstances the debtor, having deposited collaterals with his creditor, is entitled to credit for the amount of them, is shown in the opinion in *Reeves v. Plough, supra*, and the cases there cited.

Without examining the other questions discussed, we come to the conclusion that the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with instructions to overrule the demurrer to the second paragraph of the answer, and for further proceedings.



THE STATE, EX REL. PITMAN, *v.* TUCKER.

CONSTITUTIONAL LAW.—*Judicial Circuits.*—The act to divide the State into circuits for judicial purposes, etc., approved March 6th, 1873 (Acts 1873, p. 87), so far as it authorizes the election of prosecuting attorneys in October, 1873, is constitutional.

SAME.—*General Law.—Legislature.*—The legislature is the exclusive judge, whether a law on any subject not enumerated in section 22 of article 4 of the constitution can be made general and applicable to the whole State. BUSKIRK, J., dissented.

JUDGE.—*Prosecuting Attorney.*—Judges of circuit courts and prosecuting attorneys are not state, county, or township officers.

STATUTE.—*Subject of Act.*—The subject of the act to divide the State into

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130	430
46	355
135	181
136	648
46	355
144	323
46	355
151	155
46	355
153	616
46	355
155	107
46	355
158	437
46	255
168	575

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circuits for judicial purposes, etc., approved March 6th, 1873 (Acts 1873, p. 87), is circuit courts, and the other matters in the act are properly connected therewith.

From the Orange Circuit Court.

S. Claypool, J. L. Mitchell, W. A. Ketcham, C. F. McNutt,
and *G. W. Grubbs*, for appellant.

C. Baker, O. B. Hord, A. W. Hendricks, and J. W. Tucker,
for appellee.

DOWNEY, J.—This was an information in the name of the State, on the relation of Jeremiah Pitman, against the appellee. The facts stated in the information are, that on the 12th day of March, 1873, Pitman was appointed and commissioned by the governor prosecuting attorney for the tenth judicial circuit, and on the 15th day of said month gave bond, was sworn, and entered upon the discharge of the duties of the office. It is then alleged by the relator, that the defendant, on the 30th day of October, 1873, wrongfully and unlawfully usurped and intruded into the said office of prosecuting attorney of said circuit, and from that day until the present time has unlawfully and wrongfully held said office, not being then and there entitled to hold said office and exercise the duties thereof, to the damage of the relator, who of right is entitled to hold the same and discharge the duties thereof; wherefore, etc.

The defendant answered, alleging his eligibility to the office, and that at the election in October, 1873, provided for by the act entitled "an act to divide the State into circuits for judicial purposes, fixing the time of holding courts therein, abolishing the courts of common pleas, and transferring the business thereof to the circuit courts, and providing for the election of judges and prosecuting attorneys in certain cases," approved March 6th, 1873, Acts 1873, p. 87, he was duly and legally elected to the office; that on the 22d day of October, 1873, he was commissioned by the governor; that he accepted the office, and on the 29th day of said month he executed his official bond, and on the

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31st was duly sworn, etc.; by virtue of which he became, and was, and still is, the prosecuting attorney of said circuit.

There was a second paragraph of the answer. The relator demurred to the paragraphs of the answer, on the ground that they did not state facts sufficient to constitute a defence to the action.

The demurrer to the second paragraph was sustained, and that to the first paragraph was overruled, and final judgment rendered for the defendant.

The overruling of the demurrer to the first paragraph of the answer is the only error assigned.

The question presented and argued is the constitutionality of the act, the title to which is above set out, so far as it professes to authorize the election of a prosecuting attorney in October, 1873. On account of the increase in the number of circuits, there were vacancies in many of them, both in the office of judge, and also in that of prosecuting attorney. It was provided that the judges of the circuit courts then in office, residing in the circuits created by the act, should be the judges of said courts for the circuits therein provided; and, by implication, the persons holding the office of prosecuting attorney continued to act as such in the circuit in which they happened to reside according to the new districting. There being a vacancy in the office of prosecuting attorney, as also in the office of judge, in the circuits where there was no one holding the office as above, the governor was authorized to appoint some one to fill the vacancy. *Stocking v. The State*, 7 Ind. 326; 1 G. & H. 671, sec. 2; Const., art. 5, sec. 18. The eighty-second section of the act is as follows:

"On the second Tuesday of October, 1873, a general election shall be held in the proper counties to elect judges and prosecuting attorneys in place of such judges and prosecuting attorneys as may be holding their office by appointment of the governor; and such election shall be held and

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conducted under the laws and regulations governing general elections in this State."

The first objection urged against the law is stated in the brief of counsel for the appellant, as follows: "The law is special, and provides for a special election. It is therefore in conflict with section 22 of article 4 of the constitution of the State, which declares, that 'the General Assembly shall not pass local or special laws, in any of the following enumerated cases; that is to say: * * Providing for opening and conducting elections of state, county, or township officers, and designating the places of voting,' and with section 23 of the same article, which is as follows: 'In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state.'

In *Thomas v. The Board of Commissioners, etc.*, 5 Ind. 4, it was held competent for the courts to inquire whether a general law can be made applicable to the subject-matter of a local or special law enacted by the legislature, when it did not violate section 22, but was supposed to violate section 23, above quoted. But in *Gentile v. The State*, 29 Ind. 409, that case was overruled, and it was held, that the legislature was the exclusive judge whether a law on any subject not enumerated in section 22 can be made general and applicable to the whole State. This case was followed by *The State v. Boone*, 30 Ind. 225; *Longworth's Ex'rs v. The Common Council of Evansville*, 32 Ind. 322; *Clem v. The State*, 33 Ind. 418. Thus the rule stands now, and, without entering into an examination of the question which is the better rule, being at all times opposed to overruling cases without a strong necessity for so doing, we adhere to the rule as it now stands. The law in question in this case does not fall within any of the specifications of section 22. It does not provide for opening and conducting elections of state, county, or township officers, designating the places of voting, nor violate

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section 22 in any way. Whether it does or does not violate section 23, was a question for the legislature, under the rule above recognized.

Judges of the circuit court and prosecuting attorneys are not state, county, or township officers. Art. 5, sec. 18, Const., and 1 G. & H. 671, sec. 2.

The second objection to the law is, that it violates section 18 of article 5 of the constitution of the State. That section is as follows: "When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when, at any time, a vacancy shall have occurred in any other state office, or in the office of judge of any court; the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." Counsel have not urged this objection in their brief. We may therefore dismiss it by saying that we do not perceive any point in which that section is violated by the act in question.

The third objection is, that the act is in conflict with section 14 of article 2, which declares that "all general elections shall be held on the second Tuesday in October." The election in this case was provided for and held on that day.

The fourth and last objection urged is, that the law, so far as it provides for an election, is void, because it is in conflict with section 19 of article 4 of the state constitution. That section is as follows: "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Counsel state their position on this point thus: "We further submit that the law in question is void, because in conflict with section 19 of article 14, which provides that every law shall embrace but one subject and matters properly connected therewith. The subject of the act of

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March 6th, 1873, clearly appears to be a division of the State into circuits for judicial purposes. Two other subjects are embraced in the title and in the act, one of which is the matter embraced in section 82, and is expressed in the title by these words in the conclusion of the title, to wit: 'and providing for the election of judges and prosecuting attorneys in certain cases.' This part of the title and section 82 introduce a new and distinct field of legislation, the subject of elections."

We suggest that the position of counsel, if tenable, would be fatal to their case. The clause of the constitution providing that every act shall embrace but one subject and matter properly connected therewith, does not, when two subjects are embraced in an act, authorize the court to say which shall be the subject of the act, and hold the provisions relating to such subject valid, and the provisions of the act not relating to that subject void. But the plain and evident construction is, that in such case the whole act is void. If, for illustration, to divide the State into circuits and fix the time of holding the courts therein is one subject with a matter properly connected therewith, to abolish the common pleas and transfer the business thereof to the circuit courts is another subject with a matter properly connected therewith, and to provide for the election of judges and prosecuting attorneys is another subject, it must follow that the whole act is void, and in that case there was no law under which the relator could claim to hold the office of prosecuting attorney, to which he was appointed; and consequently he could have no standing in court to contest the right of the appellee. 2 G. & H. 323, sec. 752.

It may be doubted whether the section of the constitution in question has accomplished all the good that was anticipated when it was adopted. It was said in *The Indiana Central R. W. Co. v. Potts*, 7 Ind. 681, that its objects were, first, to have the title indicate the subject-matter of the act; and, second, to promote the codification of the statutes. We apprehend that the main purpose was to prevent the passage

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of bills containing important provisions concealed under a title which gave no intimation of their presence. It seems to have been supposed by the authors of the section that the legislature would first form the title of the act, and then arrange the sections and clauses of the act so as to bring them within the title. But every person acquainted with the mode of legislation knows that to agree upon the title of the act is the last thing which is done by the legislature. A bill may pass through all its readings, references, and reports thereon, and be finally passed under one title, and at last receive a title wholly different from that which it had during its enactment; thus almost, if not entirely, defeating what seems to us the main object of the section.

Some of the most important and difficult causes presented to this court have arisen under this section of the constitution. The case under consideration is by no means the least of them. If this act contains two or more subjects of legislation, and the whole act is therefore void, it is not only the election of the appellee that must be affected, but the election of all other persons who were elected prosecutors at the same time; also, the election of all those persons who were elected to the office of judge at the same election; also, the holding of all the circuit courts which have been held since the act took effect, and all the business done in these courts, the terms of which were fixed by the law, would be wholly unauthorized. The train of evils which would follow could hardly be imagined. But notwithstanding these consequences, it is the duty of the court, if the act is plainly in violation of the constitution, to so decide, without regard to the evils that may ensue.

This court has been inclined, however, to follow a somewhat liberal rule with reference to the titles of acts of the legislature, in every case resolving the doubts in favor of the validity of the act, when the question was not clear of reasonable doubt.

Two courts had been in existence in the State, with jurisdiction concurrent in many respects. The legislature con-

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cluded that it would best serve the public interest to dispense with one of them, and confer upon the remaining court the jurisdiction which had been exercised by both of them. The court which was to remain was the circuit court, and this was no doubt the subject in the mind of the legislature in framing the act. The other matters in the act were regarded as matters properly connected with the main subject. As there was to be in the future but one court, when before there had been two, a greater number of circuits was necessary; and hence, to divide the State into circuits was one thing to be accomplished by the act. Fixing the time of holding the courts was essential. As the circuit court was to transact the business which had been theretofore done in the common pleas, that court must be abolished as no longer necessary, and the business pending in it transferred to the circuit court. And what more appropriately connected with the subject than to authorize the election of the judges and prosecuting attorneys of the courts for which the act was providing? We hold, then, that the subject of the act is circuit courts, and that the other matters in the act are matters properly connected therewith.

See *The Indiana Central R. W. Co. v. Potts, supra*; *Bright v. McCullough*, 27 Ind. 223; *Shoemaker v. Smith*, 37 Ind. 122.

The judgment is affirmed, with costs.

BUSKIRK, J., dissents from so much of the foregoing opinion as holds that the legislature is the exclusive judge as to whether a general law could be made applicable under the twenty-third section of article four of our constitution. In his opinion, the decisions of this court in *Gentile v. The State* and the subsequent cases adhering thereto, in effect, abrogate such section of the state constitution; and the true construction of such section was placed thereon by this court in *Thomas v. The Board, etc.*, 5 Ind. 4.

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46	363
131	569
46	363
162	556
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GRAND JURORS.—Record.—Where the record states that the grand jurors returning an indictment were "good and lawful men, householders" of the proper county, it will be presumed that they possessed all the statutory qualifications.

INDICTMENT.—Motion to Quash.—A motion to quash an indictment must, as a general rule, be predicated upon objections apparent upon the face of the indictment.

SAME.—Return of Indictment.—Where the record recites that the grand jury came into "open court and returned the following indictment," giving its number and setting it out, it sufficiently shows that it was returned into open court, and sufficiently identifies the indictment.

SAME.—Filing Indictment.—The statute does not require the clerk to file an indictment in open court or that the act of marking it filed shall be done in open court.

SAME.—Voluntary Manslaughter.—An indictment for manslaughter charging that the defendant did, on, etc., at, etc., unlawfully and feloniously kill a person named, by then and there unlawfully and feloniously cutting, stabbing, and mortally wounding said person with a knife, etc., is sufficient. So, also, if it is charged that the instrument used was unknown to the grand jurors.

INVOLUNTARY MANSLAUGHTER.—Involuntary manslaughter is where the killing is done involuntarily, but in the commission of some unlawful act.

SAME.—Indictment.—An indictment for involuntary manslaughter must show that the defendant was in the commission of some unlawful act, and that the death resulted therefrom.

SAME.—Alleging in such case that the death resulted from using, unlawfully, wilfully, and feloniously, an instrument upon a pregnant female, for the purpose of producing a miscarriage, the use of such instrument not being necessary to preserve the life of the woman, is insufficient.

PRACTICE.—Indictment Containing Good and Bad Counts.—General Finding of Guilty.—Where a defendant is found guilty upon an indictment containing two or more counts, one of which is bad, and the evidence tends to support the bad count, and none of it to support the good counts, the judgment must be reversed.

From the White Circuit Court.

H. C. Thornton and O. M. Conahay, for appellants.

J. C. Denny, Attorney General, for the State.

DOWNEY, J.—This was an indictment against the appellant for manslaughter. The indictment contains three counts, and, after the heading, is as follows:

" 1. The grand jury of White County, in the State of Indiana, good and lawful men, duly and legally impanelled,

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charged and sworn to inquire into felonies, etc., in and for the body of said county of White, in the name and by the authority of the State of Indiana, on their oaths present that Sylvester Willey and Sarah Wheaton, both of said county, on the 15th day of December, A. D. 1873, at the county and State aforesaid, did then and there unlawfully and feloniously kill Mary L. Willey, by then and there unlawfully and feloniously cutting, stabbing, and mortally wounding the said Mary L. Willey with a knife, which they, the said Sylvester Willey and Sarah Wheaton, then and there had and held in their hands.

“ 2. The grand jurors aforesaid, upon their oaths aforesaid, further present that said Sylvester Willey and Sarah Wheaton, on the 15th day of December, A. D. 1873, at the county and State aforesaid, did then and there unlawfully and feloniously kill Mary L. Willey, by then and there unlawfully and feloniously cutting, stabbing, and mortally wounding said Mary L. Willey, with an instrument to the grand jurors unknown, which they, the said Sylvester Willey and Sarah Wheaton, then and there had and held in their hands.

“ 3. The grand jurors aforesaid, upon their oaths aforesaid, further present that the said Sylvester Willey and Sarah Wheaton, on the 15th day of December, A. D. 1873, at the county and State aforesaid, did then and there unlawfully and feloniously kill Mary L. Willey, by then and there unlawfully, wilfully, and feloniously employing a certain instrument, to the grand jurors unknown, upon the body of said Mary L. Willey, who was then and there a pregnant woman, by then and there unlawfully, wilfully, and feloniously introducing said instrument into the womb of the said Mary L. Willey, with intent then, there, and thereby to procure the miscarriage of the said Mary L. Willey, the said employment of the said instrument not being then and there necessary to preserve the life of the said Mary L. Willey, contrary to the statute,” etc.

A motion to quash each count of the indictment was made by the defendants separately, and overruled by the

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court. They then pleaded not guilty, and on a trial by jury were found guilty and their punishment fixed at ten years imprisonment in the state prison. They asked for a new trial, but it was denied them, and sentence was pronounced against them according to the verdict of the jury.

By their assignment of errors, the defendants have presented for our decision the question as to the sufficiency of each count of the indictment, and also whether or not the court erred in refusing to grant them a new trial.

The first ground in support of the motion to quash is, that it does not affirmatively appear from the record that the grand jurors who found the indictment possessed all the requisite qualifications mentioned in the statute, which requires them to "be reputable freeholders or householders of the proper county, and taxable therein." 2 G. & H. 431, sec. 1. The transcript states that they were "good and lawful men, householders of White county, Indiana." We think it should be presumed that the grand jurors possessed all the statutory qualifications. The want of qualification does not appear on the face of the indictment, if there was any such want, and a motion to quash an indictment must, as a general rule, be predicated upon objections apparent on the face of the indictment. *Bell v. The State*, 42 Ind. 335, and cases cited.

The next ground in support of the motion is, that the record does not show that the indictment was returned into open court. The record states: "Come into open court: the grand jury heretofore empanelled herein, and return the following described indictment, number thirteen, for manslaughter, which reads as follows, to wit:" then follows the indictment. It is said by counsel that this is insufficient because it does not show that while the grand jury was in open court the indictment was returned. We cannot agree with counsel in this. The formula is that in common use, and sufficiently shows that the indictment was returned into open court by the grand jury.

But it is urged that "the record wholly fails to show that:

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the indictment was ever filed, much less that it was filed in open court." There is nothing in this objection. The indictment as copied in the record has on it the file mark of the clerk as of the date when it was returned by the grand jury into court. Counsel concede that the file mark appears upon the indictment as copied in the record, but say: "Who put it there? The clerk? He does not say so. Nobody says so. The record does not say, either directly or indirectly, or inferentially, that it was filed by the clerk, and even this recital does not state that it was filed in open court as the statute requires." Counsel refer to 2 G. & H. 394, sec. 16. That section says the indictment, when signed by the foreman, must be "returned into open court, and filed by the clerk." It does not require the clerk to file the indictment in open court, nor that the act of marking it filed shall be done in open court.

Again counsel say the indictment is not identified as that which was returned by the grand jury. The record, as we have seen, shows the return of the indictment by its number, and then sets it out.

It is also urged that the record fails to show that the indictment was endorsed by the foreman of the grand jury as a true bill. It is conceded that the proper indorsement appears in the record as being on the indictment, but counsel say: "Who wrote it, or whether it was written before or after the return, does not appear." This is entirely too critical.

Counsel urge the insufficiency of the first and second counts of the indictment, for the reason that they do not sufficiently describe the crime. It is said the use of the words "unlawfully" and "feloniously" are not sufficient to characterize the killing and constitute a charge of manslaughter. In our opinion, the counts are each sufficient as a charge of manslaughter. 2 G. & H. 438, sec. 8. Counsel suppose the allegations of these counts of the indictment consistent with an innocent and necessary surgical operation. But this would not be an unlawful and felonious act such as that described in the indictment. The first and

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second counts of the indictment describe what is known as voluntary manslaughter.

The third count is for involuntary manslaughter. Homicide of this kind is when the killing is done involuntarily, but in the commission of some unlawful act. 2 G. & H. 438, sec. 8. To make the paragraph good, it must be alleged that the defendants were in the commission of some unlawful act, and that the death resulted therefrom. The death of the party is something not contemplated by the parties, but as they are engaged in the commission of the unlawful act, and as death results from it, they are guilty of manslaughter.

Counsel for appellants insist that it does not appear from the third paragraph of the indictment that the defendants were in the commission of an unlawful act when the death resulted, and refer, to sustain their position, to *Bassett v. The State*, 41 Ind. 303.

The statute, on the subject of abortion, 2 G. & H. 469, sec. 36, so far as applicable to the case under consideration, provides that every person who shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, any thing whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty, etc. In the case cited, it was held that where the indictment alleged that the employment of the instrument was not necessary to preserve the life of the woman, and did not allege that the miscarriage was not necessary to save her life, the indictment was not good and should have been quashed.

The count of the indictment in question in this case alleges that "the employment of the said instrument was not necessary to preserve the life of the said Mary L. Willey." It thus appears that it is not charged that the defendants were in the commission of an unlawful act, when the death ensued. We must hold that the third count of the indictment was bad.

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There are other questions discussed by counsel, but some of them are not so presented that we can decide them, and others need not be decided.

What disposition must be made of the case upon the conclusions which we have reached with reference to the questions already decided? The first two counts of the indictment we have found to be good. The third we have found to be defective. Upon examination of the evidence, we find it all tends to support the third count, and none of it to support the first and second counts. Under these circumstances, we think the judgment must be reversed.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion to quash the third count of the indictment; and the clerk will certify to the warden of the state prison.

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46	368
144	107
144	538
145	180
146	268
46	368
165	212

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BASTARDY.—*Appeal.*—The plaintiff may appeal from the judgment of a justice of the peace discharging the defendant in a bastardy suit.

SAME.—*Evidence.*—*Judgment.*—In a bastardy proceeding, the record of a judgment in an action of seduction by the relatrix against the defendant is not admissible to prove the fact of sexual intercourse.

CHANGE OF VENUE.—*Jurisdiction.*—Where a change of venue is taken from a judge of a court, and he sets the case down for trial before another judge, and the latter fails to appear, or, appearing, fails to finally dispose of the case, the action is not thereby discontinued, but continues by operation of law on the general docket of causes pending in such court, and the judge thereof may appoint another judge to try the cause.

WITNESS.—*Impeachment.*—Where a witness, on cross-examination, denies having testified differently in another action where the same matter was in controversy, he cannot be contradicted by the bill of exceptions in the former action, which purports to contain the evidence given by the witness therein, he not being a party to the action in which such bill of exceptions was filed.

From the Montgomery Common Pleas.

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J. E. McDonald, J. M. Butler, E. M. McDonald, S. C. Willson, and L. B. Willson, for appellant.

J. McCabe, for appellee.

BUSKIRK, J.—This was a prosecution for bastardy commenced, on the relation of Margaret Clore, against the appellant, before a justice of the peace. The examination before the justice resulted in the discharge of the appellant, and an appeal was taken by the State to the common pleas, where the cause was tried in October, 1870, before Judge TEST, then judge of the 12th judicial circuit, and a verdict was rendered for the plaintiff, as follows: "We, the jury, find that William Glenn is the father of the bastard child as charged in the complaint." The only complaint in the cause was the affidavit filed before the justice of the peace. In the common pleas court, the appellant moved to dismiss the case for the want of jurisdiction, but his motion was overruled, and he excepted. A change of venue was taken from the judge of such court, and the case was set down for trial before Judge GREGORY, then a member of this court. At the time set, Judge GREGORY appeared and took jurisdiction of the case, and continued it to a day named for trial, at which time he failed to appear, and the cause went back to the next regular term, at which time the judge of said court again set the cause down for trial, over the objection and exception of appellant, and appointed Judge TEST to try it. On the day named, Judge TEST appeared, and, over the objection and exception of appellant, took jurisdiction of the cause. The appellant then filed a demurrer to the jurisdiction of the court, which was overruled, and the appellant excepted. Thereupon the appellant filed an answer in two paragraphs:

1. The general denial.
2. The second was a plea in abatement, and set up the history of the case previously given, and claimed that the court possessed no jurisdiction of the case.

A demurrer was sustained to the second paragraph of the

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answer, and the appellant again excepted. The cause was then continued, on the application of the appellant, to the 2d day of August, 1870; at which time, on the application of the State, it was continued to the 13th of October, 1870, when it was tried with the result above stated. A motion for a new trial was filed, embracing for causes the ruling of the court on the question of the jurisdiction of the court, and the various rulings of the court upon the trial. The motion was overruled, and an exception taken. There was also an exception to the judgment rendered, and bills of exceptions were filed presenting the several questions.

Many questions were reserved in the court below, and various errors are assigned, but the questions argued by counsel for appellant and insisted upon as grounds for reversing the judgment are the following:

1. The want of jurisdiction in the court of common pleas to hear and determine the cause.
2. The want of jurisdiction of Judge Test to hear and determine the cause.
3. Error of the court on the trial, in admitting improper evidence on the trial.
4. Error of the court on the trial, in excluding competent evidence offered on the part of the appellant.
5. Erroneous instructions given by the court.
6. The refusal of the court to give proper instructions as asked by appellant.
7. The erroneous ruling of the court in requiring appellant to stand committed until the judgment was paid or replevied.

These questions will be considered in the order stated.

The objection urged to the jurisdiction of the court below is, that the justice of the peace having discharged the appellant, the State had no right to appeal from such order to the circuit or common pleas court.

In *Walker v. The State*, 6 Blackf. 1, this court held, that the State may appeal to the circuit court from the judgment of a justice of the peace in favor of the defendant in a case

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of bastardy. The ruling in the above cause was based upon the statute of 1838. The language of that statute on the subject is: "In all cases not otherwise specially provided for by this act, or some other statute of this State, it shall be lawful for any party to any judgment of any justice to appeal therefrom at any time," etc. R. S. 1838, p. 383.

In *Neff v. The State, ex rel. Patterson*, 3 Ind. 564, the ruling in the above case was adhered to and followed. The ruling in this case was made while the revision of 1843 was in force. This court said that the statute of 1843 did not materially differ from that of 1838. The statute of 1843 was as follows:

"Sec. 159. In all cases not otherwise specially provided for in this chapter, or some other law of this State, any party to the judgment of any justice of the peace may appeal therefrom to the circuit court of the county where such judgment was rendered, within thirty days after the rendition of such judgment; and from and after the time of taking such appeal, all further proceedings before the justice shall be stayed."

In *Risk v. The State, ex rel. Vestal*, 19 Ind. 152, this court held that the State might appeal from the judgment of a justice discharging a defendant in a prosecution for bastardy.

In the above case, this court said that they had compared the statute of 1852, under which the decision was made, with the previous statutes on the subject, and found that there was no material difference.

The statute of 1852 is as follows: "Any party may appeal from the judgment of any justice to the court of common pleas of the county, or the circuit court." 2 G. & H. 593, sec. 64.

It is contended by counsel for appellant that the statute of 1838 is broader than that of 1852. We think otherwise. In the statute of 1838, the right of appeal is given in all cases except where otherwise specially provided. This placed a limitation upon the right. The statute of 1852

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contains no such restriction. The language is general and comprehensive. It says "any party" may appeal.

This court in *The State, ex rel. Work, v. Brown*, 44 Ind. 329, recognized the right of the State to appeal by holding that there could be no appeal where there was no judgment rendered by the justice discharging the defendant.

There does not seem to have been much controversy in the first three cases cited as to the right of the State to appeal, but the question in each case seemed to be whether the appeal could be taken without bond, and it was held that no bond had to be given.

This court, in *The State v. Evans*, 19 Ind. 92, held that a prosecution for bastardy is a civil proceeding, and this case was followed in *Byers v. The State, ex rel. Hutchison*, 20 Ind. 47, *Lower v. Wallick*, 25 Ind. 68, and *The State, ex rel. Billman, v. Hamilton*, 33 Ind. 502.

It having been so held from the organization of this court, under statutes substantially the same, we do not think the question should any longer be regarded as an open one.

In our opinion, the appeal was properly taken, and the court below had jurisdiction of the case.

Counsel for appellant contend that the common pleas court possessed no power to set the case down for trial before Judge Test. The argument is this: That when the common pleas court granted the change of venue and set the case down for trial before Judge GREGORY, who appeared and assumed jurisdiction of the cause, such court exhausted its power and authority over the case, and that the failure of Judge GREGORY to appear at the time to which he had continued the cause did not have the effect to transfer the cause back to the next regular term of the common pleas court, and that consequently such court possessed no power to set the case down before Judge Test for trial.

We have not been able to find any statute which provides for such contingency, but the question has been expressly decided adversely to the position assumed by counsel for appellant, in the case of *Singleton v. Pidgeon*, 21 Ind. 118.

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where the court uses this language: "In such cases, where the judge called in fails to appear at the time designated for the trial, or, appearing, fails to finally try the cause, the same is not discontinued, but passes to, and continues by operation of law upon, the general docket of causes pending in said court. A change of judge, in such case, does not work a change of court. The court continues the same. Public policy requires this rule.

We fully concur in the ruling in the above case. We think that Judge Test was properly appointed and possessed full power and authority to hear and determine such cause.

We proceed to inquire whether the court admitted, upon the trial, illegal and incompetent evidence.

It appears from the bill of exceptions, that the court, over the objection and exception of the appellant, permitted the appellee to read in evidence the record and judgment of the court of common pleas of said county of Montgomery, in the case of *Margaret Clore v. William Glenn*, the appellant, for seduction. After the record and judgment in such case was read in evidence, the court permitted the following questions to be asked of the complaining witness :

"What child, if any, was the result of the intercourse alleged and testified to in the record and proceedings already spoken of?"

To which question the witness answered, "The child I now hold in my arms."

"What child was it that was referred to in that record and testified to about upon the trial of said cause?"

To which the witness answered, "This is the child."

It will be more convenient to consider, in connection with the above evidence, the instruction of the court in reference thereto, and which was as follows:

"The court admitted the record in the case of seduction between the complainant and the present defendant, for the sole purpose of showing that the complainant and William Glenn had sexual intercourse with each other, and for no

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other purpose. This fact is already *res adjudicata* and cannot be disputed."

The record in the seduction case was admitted by the court, for the purpose of establishing the fact that sexual intercourse had taken place between the complaining witness and the defendant, William Glenn, and the court instructed the jury that such record conclusively established such fact, and that it was to be regarded by them as *res adjudicata*, and could not be disputed or inquired into.

It is contended by counsel for appellant that such record was inadmissible upon two grounds:

1. That the parties are not the same in the two cases.
2. The record was not mutually binding upon the parties, and could not have been admitted in the present case by the defendant, if the judgment had been in his favor in the seduction case.

The law as applicable to both these questions is clearly settled by this court in the case of *Maple v. Beach*, 43 Ind. 51, where DOWNEY, J., speaking for the whole court, says:

"A judgment is always evidence of the fact that such a judgment has been given, and of the legal consequences which result from that fact. 1 Starkie Ev. 317; 1 Greenl. Ev., sec. 538. This is true whether the person against whom it is offered as evidence was a party to the action in which it was rendered or not. But when the judgment is offered not merely as evidence of its own existence, but as proof of some fact or facts upon the supposed existence of which the judgment was founded, the rule is very different. When the judgment is offered for this last named purpose, the general rule is, that it is not binding upon any one except the parties thereto, those who might legally have become parties, and those in privity with them. 1 Stark. Ev. 323, and 1 Greenl. Ev., sec. 252.

"Another principle which governs in the admissibility and effect of judgments as evidence is, that the binding force and effect of the judgment must be mutual. Prof. Greenleaf, speaking of judgments as evidence, says: 'But to pre-

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vent this rule from working injustice, it is held essential that its operation be mutual.' Vol. I, sec. 524. Mr. Starkie says: 'It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be mutual. This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence, the parties must be the same, for then the benefit and prejudice would be mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterward make use of it, for between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point.' Vol. I, p. 331."

The action of seduction was between Margaret Clore and William Glenn. The action was brought by the plaintiff to recover damages for her own seduction. The action being brought in her own right, the recovery would belong absolutely to her. The present action is brought in the name of the State, on the relation of Margaret Clore, against William Glenn, who was defendant in both actions. The amount recovered in an action of bastardy has, by the express requirement of the statute, to be expended, under the order of the court, for the maintenance and education of the child. The judgment is rendered in the name of the State, but the court must, in its order, direct to whom the annual payments shall be made. If the mother is a proper person, the money must be paid to her, but if she is dead or an improper person to receive the same, the court is required to appoint some other person to expend the money in the support, maintenance, and education of the child. 2 G. & H. 628, sec. 15. If the child should die after judgment, but before the expiration of the time limited for the last payment, the court may make such reduction in the amount of the judgment as may be rendered proper and just in consequence of such death. 2 G. & H. 629, sec. 19. The action is not brought in the name of the mother, nor does the judgment recovered

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belong to her. It is true that she has such an interest in the result of the action as to affect the weight which should be given to her evidence. We have recently so held in *Keating v. The State, ex rel. Homan*, 44 Ind. 449, and overruled the case of *Dailey v. The State*, 28 Ind. 285, on that point, which held the other way.

The father of an illegitimate child is not legally bound, except in the manner provided in our bastardy act, to support it. The burden and responsibility of supporting and educating a bastard child rests upon the mother. The amount adjudged against the father, under our statute, is appropriated to the maintenance and education of the child and to that extent relieves the mother, and thus gives her such an interest in the result of the action as to make it proper for a court or jury to take such interest into consideration in determining the weight which should be given to her testimony, but this does not make her a party to the action, so as to render competent the judgment in the former action. See sec. 1499, p. 1444, Taylor Ev.; *Case v. Reeve*, 14 Johns. 79; 2 Phillipps Ev. 7.

Having reached the conclusion that the parties in the two actions are not the same, the question of mutuality does not arise in the record, and we decide nothing in reference thereto.

It is insisted by counsel for appellant that the court erred in refusing to give the ninth, tenth, eleventh, twelfth, and thirteenth instructions asked by appellant. The ninth related to an *alibi*, and the tenth to the record in the seduction case. We think these instructions should have been given.

In our opinion, the eleventh, twelfth, and thirteenth instructions asked and refused were fully embraced by the instructions given, and that the court committed no error in refusing them.

Dr. Armstrong T. Steel testified on behalf of the appellant, that he attended upon the complaining witness at and subsequent to her confinement; that after the birth of the

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child she informed him that another person than the appellant was the father of the child. For the purpose of impeaching him, a large number of questions were asked him as to statements made by him to other persons, and upon his denying having made such statements, such persons were called to testify to what he had said in such conversations. A portion of the questions asked of this witness related to a conversation which he had with one of the counsel for appellee. As to such questions, it claimed that they related to immaterial and irrelevant matters, and that the appellee was bound by the answers given, and could not call the person with whom the conversation had taken place to testify to what had been said. The most of the questions related to what the doctor had said as to the state of mind of the complaining witness at the time she had stated who the father of her child was. The purpose of the questions was to show that Dr. Steel had said that, when such statement was made she was wild and crazy from the use of morphine, and did not know what she was saying. We think the subject of inquiry was neither immaterial nor irrelevant, but was pertinent and material.

We think the court committed no error in admitting such evidence.

For the purpose of impeachment, counsel for appellant asked Perry Gailand, a witness called by the appellee, if he had not made certain statements on the trial of the seduction case in conflict with his testimony given on this trial, and upon his denying that he had made the statement imputed to him, at the proper time the appellant offered the record of the evidence of said Gailand, embraced in the bill of exceptions filed in the seduction case, to contradict and impeach him, but the appellee objected to the admission of such evidence, and the objection was sustained, and the evidence was excluded.

We think there was no error in the ruling of the court.

The appellant might have proved the substance of the testimony of the witness on the former trial, by any person

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who had heard him testify, but the bill of exceptions embodying the evidence upon such trial was not admissible for that purpose. The witness was not a party to that action and was not bound by what was contained in the bill of exceptions. Such a practice might lead to very dangerous results.

The judgment is reversed, with costs; and the cause is remanded, for a new trial in accordance with this opinion.

Petition for a rehearing overruled.

THE STATE *v.* TOOHY.

PRACTICE.—Motion for Leave to File Paper.—Criminal Law.—Affidavit.—Where, on appeal to the circuit court, in a prosecution for a misdemeanor instituted before a justice of the peace, the State moved for leave to file a substituted affidavit, the original having been lost from the files, and filed affidavits showing that said original was not on the files, and had been lost, but did not produce or offer to file a substitute, the motion was properly overruled, and the prosecution was thereupon properly dismissed for want of an affidavit.

From the Ohio Circuit Court.

J. C. Denny, Attorney General, and *D. T. Downey*, for the State.

J. R. Troxell, for appellee.

OSBORN, J.—This was a prosecution for a misdemeanor, instituted before a justice of the peace, where judgment was rendered against the appellee, who appealed to the circuit court. In that court, the State, by her prosecutor, asked leave to file a substituted affidavit to supply the original, which had been lost from the files, and in support of the motion filed affidavits showing that the original was not on the files, and had been lost. The State did not produce, or offer to file, a substitute. The motion for leave to file the

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substituted affidavit was overruled, and the prosecution was dismissed for want of an affidavit.

In *Richardson v. Howk*, 45 Ind. 451, we held that it was not error to overrule a motion for leave to file a paper, unless it appeared by the record that the party asking the leave offered to file it, and that it was a legitimate paper to be filed in the cause.

If, in the case at bar, the State had offered to file a substituted affidavit, and the bill of exceptions contained a copy of such affidavit and proof showing that it was a substitute, the question would be before us, whether it was a case where a substitute was allowed to be filed. But there is nothing of the kind in the record.

The judgment of the said Ohio Circuit Court is affirmed.

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46 370
142 667

From the Marion Criminal Circuit Court.

L. Feibleman and *J. S. Harvey*, for appellant.

J. C. Denny, Attorney General, *R. P. Parker*, *H. Lee*, and *J. B. Elam*, for the State.

WORDEN, C. J.—This was a prosecution against the appellant for selling intoxicating liquor to a minor. Conviction.

The only question raised in the case is, whether the evidence was sufficient to sustain the verdict.

There was evidence introduced which was clearly sufficient. But there was evidence which was in conflict with it, and tended strongly to show that the defendant was innocent. The jury weighed it, and in accordance with the long established practice, we cannot disturb the conclusion arrived at by the jury.

The judgment below is affirmed, with costs.

McCabe v. The Board of Commissioners of Fountain County.

46	380
144	109
46	380
164	606

McCABE v. THE BOARD OF COMMISSIONERS OF FOUNTAIN COUNTY.

COUNTY COMMISSIONERS.—*Parol Contracts of.*—A parol employment by the board of county commissioners, at a legal session, of an attorney to defend a suit brought against the county is valid, and such attorney, having rendered the service involved in his employment, may recover compensation therefor.

SAME.—In employing counsel, the board of county commissioners acts as a corporation, and, like other corporations, may employ agents and attorneys without making such employment a matter of record; but this must be done by the concurrent act of a majority of the board at a legal session.

From the Marion Civil Circuit Court.

R. C. Gregory and J. McCabe, for appellant.

M. Milford, for appellee.

DOWNEY, J.—This action was commenced in the Fountain Common Pleas, and by change of venue was finally tried and decided in the Marion Civil Circuit Court. The action was brought by the appellant against the appellee for services rendered as an attorney and counsellor at law for the appellee, in an action or proceeding by mandate, by the Indianapolis, Bloomington, and Western Railway Company against the said board of commissioners, in the Fountain Circuit Court, and in the Supreme Court. The proceeding by mandate was to enforce the claim of the said railroad company to the proceeds of a tax which had been voted, levied, and collected, to aid in the construction of its road, and it was decided in favor of the board of commissioners. The only paragraph of the answer, to which demurrers were not sustained, was the general denial.

There was a trial by jury, a verdict for the defendant, a motion for a new trial made by the plaintiff overruled, and final judgment rendered.

Only one error is assigned, and that is, the refusal of the court to grant the plaintiff a new trial.

A single ground is assumed in opposition to the ruling of the court in refusing a new trial, and that is the exclusion by

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the court of parol evidence offered by the plaintiff to prove the retainer of the plaintiff by the commissioners, there having been no entry made on the minute or order book of that fact. The plaintiff offered to prove by a competent witness that the board of commissioners, at a regular and legal session, after the proceeding in mandate was commenced, and while the same was pending in the Fountain Circuit Court, authorized the witness, who was then the attorney for said board, by an oral direction, to employ the plaintiff as an attorney and counsellor at law, that being his profession, to assist in the defence of said proceeding in mandate ; that in pursuance of such authority, the witness did employ the plaintiff as such attorney to assist, etc., and that after such employment, and before the plaintiff entered upon the defence of the action, the witness and the plaintiff went before the board, then in regular and legal session, and informed the board of such employment, and received for reply, by two of said commissioners, "It is all right;" that thereupon the plaintiff, by their direction, drew up the affidavit for change of venue, etc., which was signed by two of the members of said board, and, in their presence, presented to said Fountain Circuit Court ; that the board, at a regular and legal session thereof, directed the plaintiff orally, in case of defeat in the circuit court, to appeal said cause to the Supreme Court, etc.; that the plaintiff appeared in said cause in the Fountain Circuit Court, and, on appeal, in the Supreme Court; that after the decision of the case in the Supreme Court, the board made an order for the repayment of the tax paid to those from whom it had been collected.

To the introduction of this evidence, the defendant objected, on the ground that the defendant could only speak by its record, in the employment of counsel to defend it in court, and that it was incompetent for such board to employ counsel to defend a suit against them by a parol agreement not entered of record in the proper record of their proceedings. The court sustained this objection, and refused to

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allow this testimony to be introduced, on the ground aforesaid.

We understand, from the bill of exceptions, that there was no claim that any order employing the appellant had been entered of record. It was not claimed that there was any evidence of a higher degree than that offered. But the question was, and is, could the commissioners employ or appoint an agent to employ counsel by a parol order—an order not entered of record on their minute or order book? The offer was to prove that the parol order was made when the board was in regular and legal session, and that it was made by the board, or a majority of them. The only question is, must it have been entered of record, and proved by the record?

We think it clear that the board of commissioners of a county is to be viewed as capable of acting in several capacities. It is undoubtedly true that the board is a corporation. The statute by which the board is created expressly declares, that "such commissioners shall be considered a body corporate and politic by the name and style of," etc., "and as such, and in such name, may prosecute and defend suits, and have all other duties, rights and powers incident to corporations, not inconsistent with the provisions of this act." 1 G. & H. 248, sec. 5.

There is as little doubt that the board is a judicial tribunal. 1 G. & H. 249, secs. 9, 10, and 11; *The State v. Conner*, 5 Blackf. 325; *The State, ex rel. Reynolds, v. The Board of Commissioners of Tippecanoe Co.*, 45 Ind. 501. Of its proceedings when acting as a judicial tribunal, a record must be made. 1 G. & H. 249, sec. 7; 1 G. & H. 250, sec. 14. We think a distinction may be made between the action of the board as a judicial tribunal and its acts as a corporation simply. In the former case, it seems settled that the acts of the board, like the acts of any other judicial tribunal, must be evidenced by its record, at least while the record remains in existence, and not by parol. To this effect is the case of *The Board of Commissioners, etc., v. Cutler*, 7 Ind.

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6, where it is said: "they can only speak by their record, when sitting as a court, and if their determination was not entered of record, there was no decision." And see *The State v. Conner*, 5 Blackf. 325.

We do not find any case which decides that the board, when acting as a corporation merely, must enter its action of record, to make it binding upon the county, or that requires that, in proving such act, it must be proved by a record made under the direction of the board. We have not discovered anything in the statute relating to the board of commissioners, or its powers and duties, which would seem to prevent it from contracting within its legitimate sphere as other corporations may contract. Doubtless, the action must be at a time when the board may be, and is, legally in session; and it must be the concurrent, and not separate and successive, act of the members. *The Board, etc., v. Chitwood*, 8 Ind. 504; *Archer v. The Board, etc.*, 3 Blackf. 501; *The Board of Commissioners, etc., v. Ross, post*, p. 404. If we are correct in this view of the question, the commissioners may contract in the same manner as any other corporation. The rule relating to the manner in which a corporation may bind itself has in modern times undergone a great change. In the work of Angell & Ames on Corporations, sec. 237, the rule is laid down, "that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents, as by deed; and that promises may as well be implied from its acts and the acts of its agents, as if it had been an individual." A long list of authorities is referred to in support of this now well established rule. No question is made, or could be made, as to the power of the board of county commissioners, in proper cases, to employ counsel to prosecute or defend an action in which the county is interested.

In our opinion, the ruling of the circuit court was erroneous. See *Ross v. The City of Madison*, 1 Ind. 281.

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The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

Petition for a rehearing overruled.

BARLOW v. THOMPSON ET AL.

INSTRUCTIONS TO JURY.—*Appeal*.—Where the evidence is not in the record, if upon any supposable state of facts the instructions given to the jury would be correct, the existence of such facts will be presumed by the Supreme Court on appeal.

CONTRACT.—*Construction of*.—On February 10th, 1869, a written contract was executed, whereby B. purchased of T. & T. certain water-wheels to be used in the mill of B., the latter to have the privilege of running the wheels thirty days, and if they did not work to his entire satisfaction, he had the right to return the same, at his mill, after such thirty days' trial, he notifying the vendors of his dissatisfaction; and in that case the latter were to pay freight and the expenses of putting in and taking out said wheels. The vendors also warranted the wheels to give the same power, under any head of water, as certain other wheels named, which warranty was to extend to September 1st, 1869.

Held, that the right to reject the wheels was limited to thirty days after commencing the use of them, and that it did not extend to the time of the expiration of the warranty.

From the Johnson Common Pleas.

A. Major, S. Major, E. H. Davis, and C. Wright, for appellant.

B. F. Davis, for appellees.

BUSKIRK, J.—This was an action by the appellees against the appellant upon a written contract, to recover the value of certain mill wheels sold by the appellees to the appellant.

The action originated in Shelby county, where the cause was tried by a jury, and resulted in a finding for the appellant. The court granted a new trial. Upon the application of the appellees, the venue was changed to the Johnson

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Common Pleas. In the latter court, upon the application of the appellant, the venue was changed from the regular judge of that court, and the Hon. H. C. Newcomb was appointed, and presided at the trial.

The case was again tried by a jury, and resulted in a finding for the appellees. The court overruled a motion for a new trial, and rendered judgment on the verdict.

The only valid error assigned is based upon the action of the court in overruling the motion for a new trial. All the other errors assigned constitute the reasons for a new trial, and are all embraced by that assignment of error.

The only questions discussed by counsel for appellant relate to the instructions given by the court of its own motion, and those asked by appellant and refused by the court.

The evidence is not in the record. The question therefore arises, whether, in the absence of the evidence, we can pass upon the instructions given and those refused. The instructions complained of placed a construction upon the written contract which was the foundation of the action. In *Murray v. Fry*, 6 Ind. 371, this court said: "When the evidence is not in the record, the court will go a great way to sustain the judgment of the circuit court. If, upon any probable state of facts, the instructions complained of would be correct, the existence of such facts will be presumed. But if the instructions are in themselves radically wrong, under any state of facts, directing the minds of the jury to an improper basis on which to place their verdict, it would be hazardous to presume that the jury had, notwithstanding such erroneous instructions, arrived at a correct conclusion."

The ruling in the above case has been adhered to in the following cases: *Eward v. The Lawrenceburgh, etc., R. R. Co.*, 7 Ind. 711; *The New Albany, etc., R. R. Co. v. Callow*, 8 Ind. 471; *Woolley v. The State*, 8 Ind. 502; *Jolly v. The Terre Haute, etc., Co.*, 9 Ind. 417; *Powell v. Pierce*, 11 Ind. 322; *Griffin v. Templeton*, 17 Ind. 234.

So far as the instructions undertake to place a construc-

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tion upon the written contract, we can determine their correctness without the evidence being in the record. The contract sued upon was as follows:

"This article of agreement, made this 10th day of February, 1869, between J. M. and W. H. Thompson, of Edinburgh, Indiana, and Henry Barlow, of Shelby county, Indiana, witnesseth: That the said Thompsons agree to furnish to the said Barlow two forty-two-inch and one thirty-inch turbine water-wheels, on the cars at Columbus, Indiana, in the course of three or four days from this time, for which he is to pay them five hundred dollars for each of said large wheels, and four hundred dollars for the small one. One-half of the whole amount to be paid when the wheels are run thirty days, as hereinafter provided, and the other half sixty days thereafter. And the said Thompsons warrant the said wheels to work to the entire satisfaction of said Barlow, they to see that they are put in properly, at Barlow's expense, and he to take care of them. And if, at the expiration of thirty days from the time they are put in and run, they do not act to the entire satisfaction of the said Barlow, after running them thirty days, he may return them to us at his said mill, he notifying us thereof, and we are to pay freights paid by him on them, and the expense of putting them in and taking them out.

The said wheels are warranted to give the same power under any head of water as the Leffel wheel. This warranty and agreement is to run to the 1st day of September, 1869.

"J. M. & W. H. THOMPSON.

"H. BARLOW."

The appellant answered in two paragraphs: 1st. The general denial. 2d. A breach of the warranties contained in the agreement was set up as a defence to the action.

The second paragraph did not allege an offer to rescind the contract and return the wheels after thirty days' trial thereof. There was also a cross complaint, which contained the same averments as the second paragraph of the answer, with the additional averments that after thirty days' trial of

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the wheels, if they did not work or operate to the satisfaction of the appellant, then appellant might return said wheels to the appellees, at his mill, and that he notified the appellees of his intention to rescind the contract, and required them to take them away, and pay freights and expenses, as provided in said contract; that upon receiving such notice the appellees requested another trial of the wheels, which was had; and upon their failure to perform to the satisfaction of appellant, and as warranted, he abandoned the wheels to the appellees, of which they had notice; that he had paid seven hundred dollars on said contract; for which, and a thousand dollars damages, a judgment was demanded.

The second instruction is the one that places a construction upon the contract. The court, after stating the substance of the agreement sued on, and the defences relied upon by the defendant, proceeds as follows: "The question has been discussed before you by counsel, as to the proper construction of this part of the contract; for the plaintiffs, it is insisted that the notice of dissatisfaction and offer to redeliver must have been given by defendant on the expiration of the thirty days' trial of the wheels, and not afterward; while defendant's counsel claim that by another provision of the contract it was sufficient to give such notice and make such offer at any time prior to September 1st, 1869. It is for the court to settle this disputed question of construction, by the language of the contract; and my conclusion is, that the option given the defendant to return the wheels to plaintiffs, in case they did not act to his satisfaction, must have been exercised as soon as he had run the wheels thirty days; and that he must have given notice to the plaintiffs as soon after the expiration of said thirty days as it could reasonably be done, considering the proximity of the residences of the respective parties. It does not seem to me that the contract will bear any other reasonable construction. It provides that one-half the whole amount of the price of the three wheels shall be paid 'when the wheels are run thirty days, as hereinafter provided, and the other half sixty

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days thereafter.' The hereinafter provision is, that if, at the expiration of thirty days from the time they are put in and run, they do not act to the entire satisfaction of said Barlow, after running them thirty days, he may return them, etc. It seems to have been the intention of the parties that if, at the expiration of the thirty days' trial, Barlow should be dissatisfied with the wheels, for any reason, he should notify the plaintiffs of such dissatisfaction, return the wheels at his mill, or offer to return them, and that the plaintiffs should receive them back, and Barlow should pay nothing, and be entitled to receive from plaintiffs the freight paid by him and the expense of putting in and taking out the wheels. What is said about the warranty and agreement extending to September 1st, 1869, has reference solely to the warranty as to the power of the wheels sold to defendant, in comparison with the Leffel wheel. Unless, therefore, you find from the evidence that the defendant determined, at the expiration of a trial of thirty days' running of said wheels, that they did not act to his entire satisfaction, and that he gave the plaintiffs notice thereof within such reasonable period thereafter as I have heretofore defined, your finding on this branch of the case must be for the plaintiffs."

The instructions asked by the appellant, and refused by the court, were the exact opposite of those given, and it is therefore, not necessary to set them out.

It is very plain to us that the construction placed upon the contract was correct. We do not think it was susceptible of any other reasonable construction. The matter is stated so clearly, aptly, and forcibly by the court below, that we do not deem it necessary to add to what was so well said in the instructions given.

The judgment is affirmed, with costs.

Lane et al. v. Whitehouse.

LANE ET AL. v. WHITEHOUSE.

PLEADING.—Failure of Consideration.—Answer.—To a suit upon a promissory note for three hundred and fifty-five dollars, an answer alleging that it was given in part payment for a saw and saw-mill, represented to be sound and perfect, and claiming a failure of consideration on account of a latent defect in pulley tighteners, of the value of fifteen dollars, causing them to break, and by breaking, to destroy and injure other parts of the machinery to the value of three hundred and eighty-five dollars, but not showing that the pulley tighteners were a part of the mill purchased, and that they broke and caused the injury complained of without the fault of the defendant, was held bad.

From the Warren Common Pleas.

W. P. Rhodes and T. McDugall, for appellants.

OSBORN, J.—This was an action upon a promissory note given by the appellee to the appellants for three hundred and fifty-five dollars. The complaint is in the usual form. The appellee answered, admitting the execution of the note and alleged that the consideration had failed, in this, that the note was given in part payment for a saw and saw-mill sold to him by the appellants, who warranted that the saw and saw-mill were sound and perfect and in perfect running order; that he, relying upon such representations and believing them to be true, purchased the saw-mill of the appellants; that the saw and saw-mill were shipped to him by the appellants from Cincinnati, Ohio, and were not seen by him until they arrived in Attica, which was after the delivery of the note sued on to the appellants; that they arrived in apparent good order and were carefully put up; that he commenced running the mill, but by reason of some latent defect, the pulley tighteners broke and were totally destroyed, being of the value of fifteen dollars, and ruined and destroyed and broke to pieces the main belt, of the value of eighty-five dollars, and rendered it totally worthless, and strained the saw-mill and machinery of the mill, and strained the engine of the appellee, injuring it to the amount of three hundred dollars; that the saw would not work until it was adjusted, at a cost of twenty-five dollars. To this answer

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the appellants demurred, on the ground that it did not contain sufficient facts, etc. The demurrer was overruled, and they excepted; a reply of general denial was filed, and the issues of fact submitted to a jury for trial, who rendered a verdict for the appellee. A motion for a new trial was filed and overruled, and an exception taken, and final judgment rendered against the appellants. The motion for a new trial and assignment of errors present the questions discussed.

The facts alleged in the answer do not show a failure of consideration of the note. The most favorable construction given to the answer only shows a defect in the pulley tighteners of fifteen dollars, and a defect in the saw, which cost twenty-five dollars to remedy, making a total of only forty dollars. The note is for three hundred and fifty-five dollars. All the other alleged damages resulted from the breaking of the pulley tighteners and do not tend to show a failure of consideration of the note. If they can be made available for the appellee, it must be as a counter-claim, attempting to set up a cause of action against the appellants.

A counter-claim is defined to be "any matter arising out of, or connected with the cause of action, which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages." 2 G. & H. 91, sec. 59.

A counter-claim setting up a cause of action against the plaintiff must state facts sufficient to constitute a cause of action in favor of the defendant against the plaintiff, or it will be subject to a demurrer. *Campbell v. Routt*, 42 Ind. 410. It must also show that the facts stated as constituting the cause of action arise out of, or are connected with, the cause of action stated in the complaint.

The facts alleged in the pleading under consideration are not sufficient to constitute a cause of action against the appellants. The allegation is, that he bought of them "a saw and saw-mill;" that "by reason of some latent defect, the pulley tighteners broke and ruined and destroyed and

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broke to pieces the main belt; * * * and strained the saw-mill and machinery of said mill and strained the engine," etc.; but it is not alleged that the pulley tighteners which broke and caused the damage constituted a part of the mill purchased of the appellants. It is not alleged that it was properly used and broke without the fault of the appellee. The pulley tighteners might be defective, and yet such defect might be so slight, that if properly used they would not break. It should have been alleged that they constituted a part of the mill furnished, and that they broke without the fault of the appellee. It is not shown that the breaking of the pulley tighteners would ordinarily or naturally endanger the main belt, the mill, or the machinery, or what connection the tighteners had with the property injured. Nothing is alleged showing that the parties could have contemplated the alleged damage resulting from breaking the tighteners. The allegations only attempt to show a sale with a warranty, a breach of the warranty, and an injury to other property of the purchaser by reason of the breach.

The case is not like *Page v. Ford*, 12 Ind. 46. In that case, Armstrong, Drake & Co. manufactured a steam engine and boiler for Ford, to be used in a saw-mill, of which they had notice, and made them expressly for that purpose; the boiler was worthless in consequence of defects in materials and workmanship; owing wholly to such defects, it burst and was destroyed and injured Ford's mill; Ford had no knowledge of the defects, etc. Considering the particular facts in that case, after referring to several decisions, the court said, on p. 52: "Whether all parts of the various decisions referred to should be held as law or not, we may safely say, that there is enough that we do approve, to enable us to determine, in the case at bar, that if the engine, etc., proved unsound and unfit for the purpose to which it was to be applied; and if, in attempting to apply it, as purposed, the purchaser should, without fault upon his part, in consequence of such unsoundness and unfitness, suffer damage by the destruction of that kind of property which it was

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reasonable that the parties to the contract contemplated would be necessarily placed in close proximity to such machinery, we are unable to perceive any good reason why such injury should not be viewed as the natural and legitimate result of the breach of the warranty."

The allegations in the answer or counter-claim, in the case at bar, do not bring this case within the reasoning of that. The pleading seems to have been prepared somewhat hastily, as pleadings must sometimes be, under our system of practice requiring issues to be formed during the session of court, and when the mind and time of the pleader may be occupied in the trial of causes. It is a case where great care and particularity of allegation is required. Facts should be stated showing that the parties might be supposed to contemplate the damages complained of in case of the breach of the warranty. Such allegations are not in the pleading under consideration.

Other questions are discussed, but as they grow out of the answer or counter-claim, which is bad, they are not properly before us, and hence we decline to pass upon them.

The judgment of the said Warren Common Pleas is reversed, with costs; and the cause is remanded, with instructions to the court below to sustain the demurrer to the answer, and for further proceedings, etc.

DINWIDDIE *v.* KELLEY.

PLEADING.—*Fraudulent Representations.*—A complaint to rescind a contract of sale of certain real estate, showing that the defendant fraudulently represented that he had purchased said real estate at a sale by an administrator of an estate, for the purpose of inducing the plaintiff to buy the real estate of the defendant, which the plaintiff, relying on the representation, did buy, showing the representations to be false, etc., was held sufficient.

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PARTIES.—In such action, the widow and children of the decedent, whose estate it had been represented had been bought by the defendant, were not necessary parties.

From the Rush Circuit Court.

B. F. Davis, R. A. Black, J. Helm, and G. H. Puntnay,
for appellant.

DOWNEY, J.—This was an action by the appellant against the appellee. There are five paragraphs in the complaint, to all of which demurrers were sustained, and thereupon judgment was rendered for the defendant. These rulings of the court are the errors assigned.

Counsel for the appellant, however, expressly waive all the errors except the sustaining of the demurrer to the fifth paragraph of the complaint.

The facts alleged in that paragraph are as follows: That heretofore, to wit, on the 22d day of July, 1870, the said defendant, for the purpose of inducing the plaintiff to enter into the agreement and make the contract hereinafter mentioned, falsely and fraudulently represented that he was the owner in fee simple, and entitled to the possession, and then in the possession, of certain real estate described in the complaint, situated in Rush county, Indiana; that he held the title to said real estate by virtue of a certificate of purchase under a sale thereof made by one John R. Mitchell, as administrator of the estate of Alvah F. Woodcock, late of that county, under and in pursuance of an order of the common pleas of said county; that the said sale had been duly reported to and approved by said court, and said sale confirmed; that said real estate was free from all incumbrances and liens whatever, save and except the sum of one thousand dollars due from him as the balance of the unpaid purchase-money therefor to said administrator, and that upon the payment thereof, he, or any person to whom he might assign or transfer such certificate of purchase, would receive from said common pleas, through said administrator, a deed conveying a perfect and unencumbered title to said real

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estate; and all of which said statements and representations were so made, as aforesaid, for the purpose of inducing the plaintiff to purchase said real estate from said defendant; and the plaintiff says that, relying upon said statements and representations, and believing the same to be true, and being then and there ignorant of the truth or falsity of the same, he did then and there enter into a certain contract in writing with said defendant for the purchase of said real estate, a copy of which is filed with the complaint, whereby he purchased of and from said defendant said real estate, and agreed to pay to him therefor the sum of eight thousand dollars, one thousand dollars thereof on demand, one-half of the residue January 1st, 1871, and the balance January 1st, 1872, with annual interest at the rate of ten per centum; that he then and there paid to said defendant said cash payment, and afterward executed his notes in all respects according to his agreement, and which he says he subsequently fully paid with the interest thereon; that at no time during the negotiation of said contract did the defendant produce his said certificate of purchase, but falsely pretending the same to be lost or mislaid, he secreted the same from the plaintiff, and has never delivered the same to him; that as a part and parcel of the said contract and agreement, it was agreed that said defendant should, on or before the term of said court of common pleas next following, pay to said administrator the residue of said purchase of one thousand dollars, and at and in said court at its said term procure a deed to be made to plaintiff and approved by the court, conveying to him, plaintiff, a perfect and unincumbered title to said real estate; and the plaintiff says that afterward, to wit, on the 8th day of August, 1870, the defendant called upon the plaintiff and then and there produced a pretended deed, a copy of which is filed with the complaint, and then and there represented to said defendant that he had paid said one thousand dollars, and that said administrator's sale had been duly and legally presented to said court together with said deed so produced, and that the court had approved said sale,

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ordered the making of said deed to the plaintiff, and had approved said deed, and then and there demanded of the plaintiff his notes as in said agreement set forth; and he says that, relying upon and believing said statements to be true, and in ignorance of the falsity thereof, he did then and there execute his notes to the plaintiff as in said agreement stipulated, and did then and there receive said deed from the defendant; that upon the maturity of said notes, he fully paid the same. And the plaintiff says that each and every of said representations as made by said defendant as herein stated was false and fraudulent, and known to be so by the defendant, in this, to wit:

1. That at the time of the making of said representations and contract, said real estate was, and still is, encumbered with a mortgage executed by the said Alvah F. Woodcock, now deceased, and his wife, in favor of one Joseph Hamilton for one thousand and eight hundred dollars.
2. That said real estate at the time last aforesaid had not been ordered sold by the said common pleas court, nor by any court or person whomsoever, and that such representations are and were false as aforesaid.
3. That the said court had no jurisdiction, power, or authority to order and direct the sale of said real estate upon the application of said administrator, and had never ordered and directed a sale as aforesaid by said defendant, for the reason that the same was the absolute property of one Mary Woodcock.
4. That said administrator had never advertised for sale and sold said real estate to the defendant, or to any person.
5. That the defendant never had or held any certificate of purchase for said real estate as by him represented as aforesaid, nor had said administrator executed to him or to any person whomsoever any such certificate of purchase, nor had said real estate ever been sold by said administrator.
6. That no sale of said real estate was ever reported to or

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approved by said common pleas as represented by said defendant.

7. That said common pleas had never ordered said administrator to make any conveyance of said land, nor has said court to this day ever made any such order, or made or approved any deed of conveyance of said lands, and that said deed so received by said defendant was never ordered or approved by said court or presented to said court.

8. That by said pretended deed of conveyance so delivered to him as aforesaid, the title to said land was not and is not vested in him by reason of the premises nor any interest therein. He says that said lands are not subject to any liens or incumbrances against him or by him created. He shows that he has paid for taxes on said lands two hundred dollars, and in insurance one hundred and fifty dollars; that he had and still has possession of said premises, and that the rental value thereof is six hundred dollars per annum; that before the commencement of this suit and immediately upon the discovery of said fraud and his defect and want of title aforesaid, to wit, ten days thereafter, he offered to reconvey any title he might have obtained by said deed to the defendant, and offered to surrender possession of said real estate to the defendant, and demanded the repayment of said eight thousand dollars, with interest thereon from the time of payment; yet to accept such reconveyance or to pay said plaintiff said purchase-money, less the amount of such rents, the defendant objected and refused, and he brings into court a deed of quitclaim of said lands to the defendant for his use under the direction of the court; wherefore, etc.

The demurrer was on two grounds:

1. That the paragraph of the complaint did not state facts sufficient to constitute a cause of action; and,

2. That there was a defect of parties plaintiffs, in this, that the widow and children of Alvah F. Woodcock were necessary parties plaintiffs herein.

There is no brief on file for the appellee, and hence we are uninformed as to the particular objection which was

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urged in the circuit court to the complaint under the first ground. The action is not on the contract, but seeks to have the contract rescinded for and on account of fraud in obtaining it. We do not see but that there are alleged fraudulent representations sufficient to entitle the appellant to relief. Possibly we might arrive at a different conclusion, could we know the ground of objection to the complaint urged in the circuit court. We see no necessity for making the widow and children of Woodcock, deceased, parties to the action. They were not parties to the contract nor to the fraud alleged, and no relief is asked against them.

The judgment is reversed, with costs, and the cause remanded.

LANCASTER ET AL. *v.* GOULD ET AL.

PRACTICE.—*Demurrer.—Next Friend.*—The fact that a complaint does not show that parties for whom one assumes to sue as next friend are infants, is not a ground of demurrer. Assuming that they are of age, the name of the next friend is unnecessary, and may be struck out on motion.

DECEDENTS' ESTATES.—*Claim.—Action to Set Aside.—Allowance of Claim.*—A legatee and the heirs of a testator may sustain an action against the executor and a creditor of the estate for the fraudulent allowance and payment of the creditor's claim by the executor, thereby reducing the assets of the estate, to have the allowance set aside, and to permit the legatee and heirs to contest the claim.

SAME.—*Parties.*—The administrator of the estate of the executor (the executor having died after the commencement of the suit) is not a necessary party to such action.

PRACTICE.—*Motion to Strike Out.*—A refusal to strike surplus matter from a pleading does not, as a general rule, constitute an available error.

SAME.—*Answer in Bar of One Plaintiff.*—Where there are two or more plaintiffs, an answer in bar generally, but setting up matter in bar of only one of the plaintiffs, is bad.

CLAIM AGAINST ESTATE.—*Allowance by Executor.*—An executor may allow a claim against the estate of his testator, if found to be correct, though the claim be not made out in an itemized form.

Lancaster *et al.* v. Gould *et al.*

From the Johnson Common Pleas.

S. P. Oyler, D. Howe, and B. F. Davis, for appellants.

K. M. Hord, A. Blair, and J. L. Hackney, for appellees.

DOWNEY, J.—The errors properly assigned in this case are:

1. Overruling the demurrer of Lancaster to the complaint.
2. Overruling his motion to strike out part of the complaint.
3. Overruling the demurrer of Lancaster to the complaint for want of proper parties.
4. Sustaining the demurrer of the appellees to the fourth paragraph of the answer of Lancaster.
5. Overruling the motion of Lancaster to strike out the answer of the defendant Robertson.
6. Sustaining the demurrer of appellees to the first paragraph of the answer of Lancaster.
7. Overruling the motion of Lancaster for a new trial.

Although the order in which the errors are assigned is not very good, we will examine them as they are made and numbered.

The complaint is as follows: "Almeda Gould, William B. Gould, James V. Gould, David B. Gould, Robert A. Gould, Emily J. Gould, Charles E. Gould, by Alonzo Blair, their next friend, and Nancy R. Gould, plaintiffs, complain of Aaron House and David Lancaster, defendants, and say, that the plaintiff Almeda is the widow and legatee of Stephen V. Gould, deceased, of," etc., "who, at," etc., "died testate, leaving all his property, real and personal, of the value of five thousand dollars, after payment of just debts against the estate, to this plaintiff Almeda so long as she remained his widow. Also, by the provisions of said will, Aaron House was appointed executor thereof; that the said other plaintiffs above mentioned are the children and heirs of the said Stephen V. and Almeda Gould; that at this time the said Almeda has not elected to take under the provisions of said will, and does not intend to so elect; and that with a proper, honest, and judicious administration of the assets of said

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estate, after the payment of all proper and legal debts, there would be left for distribution among the heirs of said estate the sum of three thousand dollars; that on the 16th day of June, 1867, and the 5th and 24th days of March, 1868, as executor of said estate, said House did pay four separate amounts of money and pretended claims, a more particular description of which the plaintiff is unable to give, against the estate, to said David Lancaster, amounting in the aggregate to three thousand and fifty-three dollars and nineteen cents; that the said executor afterward, on the 25th day of July, 1868, reported to the court the said four receipts of said Lancaster, without any specification of items or evidence of debt, for which said amounts were paid, and was by the court allowed therefor the sum of three thousand and fifty-three dollars and nine cents, without any claim, affidavit, or entry being made on the appearance docket of this court, or being filed in the clerk's office of this court, or other place, to the knowledge of this plaintiff. A copy of said report, it is alleged, is filed with the complaint. It is further averred that the said pretended claims of Lancaster were unjust and fraudulent, of which the executor had notice; but, combining and confederating with said Lancaster to cheat and defraud the estate and these plaintiffs, the said executor paid the said sums out of court, and without the knowledge of the plaintiffs; and by the payment thereof the assets of said estate in the hands of said executor were so reduced in amount that he was not able to pay the debts of said estate out of the personal property, when the personal property was sufficient to pay the same, nor has he been able to pay the statutory allowance of three hundred dollars to said Almeda, as the widow, for said reason, when said estate was sufficient to pay all just debts, and leave three thousand dollars in personal and real estate to be distributed among the plaintiffs; wherefore the plaintiffs pray that the allowance and payment of the pretended claims of said Lancaster by said executor, and the allowance to the executor by the

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court therefor be reviewed, reversed, and set aside ; and that they may be allowed to contest the same."

The demurrer of Lancaster was on two grounds :

1. That the complaint did not state facts sufficient to constitute a cause of action ; and,

2. That the plaintiffs have not legal capacity to sue.

It is not alleged that the plaintiffs for whom Blair acted as next friend were infants ; but this would hardly be ground for demurrer. It should probably be corrected by a motion to strike out the name of the next friend. Assuming that those of the plaintiffs for whom he sued as next friend were of age, they were properly parties, so far as this point is concerned, and his name was merely unnecessary, and should have been struck out. Upon both grounds of the demurrer, we think the law is with the appellees. It is provided, that any person interested in an estate, settled according to section 116, p. 518, 2 G. & H., may have the settlement set aside for mistake or fraud at any time within three years after the settlement ; and if under disabilities at the time of the settlement, then within three years after the removal of the disabilities. It is true that that section relates to final settlements, and this one is not shown to have been final. *Camper v. Hayeth*, 10 Ind. 528, was a case relating to a final settlement. *Bell's Adm'r v. Ayres*, 24 Ind. 92, is a case very much like the one under consideration. That was an action by a legatee against the administrator and a creditor of the estate, alleging that the administrator had fraudulently allowed and paid the creditor's claim, knowing it to be unjust ; and that by such payment the assets of the estate would be so reduced as to be insufficient to pay the plaintiff's legacy ; and praying that the allowance of the claim, and the report thereof by the administrator, be set aside, and the plaintiff allowed to contest the claim. It was held, that the plaintiff showed a sufficient interest to enable him to sue, and, also, that the relief sought could not be obtained by appeal from the order of the court allowing the claim, and that the action would lie. There had been no final set-

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tlement in that case. On the authority of that case, we hold that the complaint was sufficient, and that there was no error in overruling the demurrer thereto.

We could not reverse the judgment for the failure of the court to strike out the parts of the complaint referred to in the motion, to which the second assignment of error relates. Surplus matter should be struck out, but a failure or refusal to do so does not, as a general rule, constitute an available error.

Aaron House, the executor, having departed this life, his death having been suggested, and Fountain G. Robertson, the successor in the trust, having been made a defendant in his stead, the defendant Lancaster then again demurred to the complaint; this time for the reason that the administrator of the estate of House was not made a party also. The overruling of this demurrer is the third error alleged. We think it was unnecessary to make the administrator of the estate of House a party. It is not shown that he had appropriated any of the assets of the estate to his own use. The allegation is, that he had illegally and wrongfully paid the same out to Lancaster. It is probable that his estate was liable for any injury sustained by those interested in the estate of Gould. The liability was not joint in such a way as to make it necessary that the plaintiffs should pursue their remedy against his estate in this action. They had all the necessary parties to this action in court, without the administrator of the estate of House.

The next error alleged is the sustaining of the demurrer of the plaintiffs to the fourth paragraph of the answer of Lancaster. That paragraph states, that at and before the time of the allowance of the claim of this defendant by said executor, the plaintiff in this action well knew of the existence of the indebtedness of said estate to this defendant upon the items set forth in the list filed herewith and made part hereof, and had full knowledge of all the facts connected therewith, and that said claims were just and owing

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from said estate of Stephen V. Gould, deceased, to this defendant, and that this defendant was insisting and claiming that they were just and valid claims against the estate of said Gould, and consented to and agreed that said claim should be allowed and paid by said executor to this defendant ; and for the purpose of procuring money and means with which to pay off and discharge the same, and the other debts of said estate, she consented to and approved of an application by said executor for the sale of certain lands and real estate belonging to the estate of said Stephen V. Gould, and aided and assisted in procuring the order of the court for the sale of said lands, under and by virtue of which order so made by the court said lands were sold, and purchased by this defendant ; and he was thereby induced to and did purchase the same, for the purpose of enabling said executor to procure the means for the payment of this defendant upon his claims aforesaid, and the other debts of said estate ; and that the payments to him, upon the allowances in the complaint mentioned, were made to the extent therein named, in the conveyance to him of the land aforesaid, so sold by said executor and purchased by this defendant as aforesaid, under and by virtue of said order of the court as aforesaid. And this defendant specially denies all the allegations of the complaint. There is a paragraph of general denial in the answer, and hence any part of this paragraph containing denials merely is unnecessary. There is a fatal objection to the paragraph, we think, as an answer of estoppel, and that is, that it sets up acts and admissions of only one of the plaintiffs as a bar to the action. It is pleaded in bar of the action, generally, and at best can only amount to a bar as to one of the plaintiffs.

The fifth error relates to the refusal of the court to strike out the answer of the defendant Robertson. This question was not reserved by a bill of exceptions, and consequently is not properly before us for decision.

The sixth question relates to the ruling of the court on the demurrer to the first paragraph of the answer of Lan-

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caster. That paragraph of answer is as follows: "And for answer to the complaint herein, this defendant, David Lancaster, says that his co-defendant, Aaron House, departed this life testate on the — day of October, 1871, and on the — day of —, 1871, one Abel House duly qualified as the executor of the last will and testament of said Aaron House, deceased; wherefore defendant says that said Abel House, as executor of the will of Aaron House, ought to be joined as a co-defendant in this action. We have already decided this question in speaking of the second demurrer to the complaint, and need not further consider it in this place.

We come lastly to the consideration of the question as to the correctness of the ruling of the court in refusing a new trial. The jury found a general verdict for the plaintiffs, and also found, in answer to questions, that Gould was not indebted to Lancaster, and that there was fraud and collusion between House and Lancaster in the allowance and payment of the claim to Lancaster by House. The judgment was, that the allowance of the claim be set aside and held for naught, and that the plaintiffs recover their costs. The jury, as we have seen, found that there was no indebtedness on the part of Gould to Lancaster. We think it quite clear that this verdict is not sustained by the evidence; and yet, if it is to stand, the defendant would seem to be barred of any claim against the estate, although the object of this action was to set aside the allowance, and be permitted to defend against the claim. It seems quite clear from the evidence, that there was an indebtedness on the part of Gould to Lancaster at the time of the decease of Gould. Mrs. Gould herself, as we understand her, testified that her husband told her that he had purchased Lancaster's share in the mill, which they had jointly owned, for the sum of nineteen hundred dollars, and that she thought no part of it had been paid. The evidence also shows other items of indebtedness of Gould to Lancaster; that Gould was to pay the partnership debts of the firm when he purchased Lancaster's share,

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and that he had not done so. It seems to us that great injustice would be certain to result, if the verdict and judgment are allowed to stand.

We need not decide whether in our opinion the whole amount of the claim of Lancaster should have been allowed and paid by the executor, House, or not. We may say, however, that the mere fact that his claim was not made out in an itemized or detailed form was no objection to its allowance. The executor might legally allow the claim, if found by him to be correct, without this. In this instance, he seems to have used some diligence to ascertain whether the claim was correct or not, and to have called to his assistance some other persons, whom he supposed to have knowledge and skill superior to his own.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

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THE BOARD OF COMMISSIONERS OF CASS COUNTY *v.* ROSS. ET AL.

COUNTY COMMISSIONERS.—*Power to Bind County.*—*Attorney.*—The board of county commissioners can not render the county liable for services rendered by an attorney as such by a contract with such attorney, or an employment of him, when such board is not in session according to law, or when the members of the board are acting successively and separately.

From the Cass Circuit Court.

H. C. Thornton, for appellant.

N. O. Ross and *R. Magee*, for appellees.

DOWNEY, J.—The appellees filed an account against the county, consisting of several items, for services as attorneys rendered by them. The commissioners would allow only a part thereof. The appellees appealed to the circuit court, where there was a trial by the court, a finding for the plain-

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tiffs, a motion for a new trial made by the defendant overruled, and judgment on the finding. The error assigned is the refusal to grant a new trial. There is no brief for the appellees.

There was no record evidence of any contract with or employment of the appellees by the commissioners, nor does it appear that the commissioners at any time or in any manner, while sitting as such, made any contract with them for such services, or employed or retained them in such business. According to several cases decided in this court, the commissioners can bind the county only when in session according to law, and acting concurrently. It would be making a dangerous precedent to hold that they could do acts binding on the county when not in session, or when acting successively and separately. See *The Board of Commissioners of Fayette Co. v. Chitwood*, 8 Ind. 504; *Campbell v. Brackenridge*, 8 Blackf. 471; *Archer v. The Board of Commissioners of Allen Co.*, 3 Blackf. 501; *English v. Smock*, 34 Ind. 115.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

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INJUNCTION.—*Judgment.*—The remedy by injunction lies to prevent proceeding on a satisfied judgment, or where the amount due has been tendered to and refused by the judgment plaintiff.

TENDER.—*United States Treasury Notes.*—Legal tender treasury notes of the United States were offered in payment of a judgment rendered in 1858. *Held*, that the tender was good, and that the judgment plaintiff could not refuse the treasury notes and demand payment in coin.

PAYMENT.—Circumstances from which payment may be inferred discussed.

From the Carroll Circuit Court.

F. Applegate, for appellants.

L. B. Sims and F. H. Gould, for appellee.

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DOWNEY, C. J.—This was an action by the appellee against the appellants. Judgment having been rendered in the circuit court in favor of the plaintiff, the defendants appealed to this court, and have assigned, in proper form, two errors, viz., overruling their demurrer to the complaint, and refusing them a new trial.

The complaint alleges that Bowen, on the 11th day of May, 1858, recovered a judgment against Clark, in the Carroll Circuit Court, for eleven hundred and thirty-one dollars and eighteen cents and costs; that the judgment was replevied by one Colton; that certain amounts were paid on the judgment by the plaintiff; the dates and amounts being stated in the complaint through and by Colton and Colton and Barnes, which amounts were received and accepted as payments on the judgment by Bowen; and that afterward, on the 4th day of February, 1870, he tendered to Bowen two hundred and thirty dollars, the balance due on the judgment, interest, and costs, which amount, the complaint states, he now brings into court. The complaint then further alleges that on the 18th day of January, 1870, Bowen had caused an execution to issue on the judgment, which was delivered to Jackson, one of the defendants, who was sheriff of the county, which execution Jackson levied on certain real estate of Clark, particularly described in the complaint, which real estate Jackson threatens and is about to sell.

Prayer that the judgment, interest, and costs be declared satisfied, for a restraining order, and for a perpetual injunction on the final hearing.

The first objection urged by counsel for the appellant to the complaint is, that the persons through whom the payments on the judgment were made have an adequate remedy at law against Bowen by a suit to recover of him the amounts claimed to have been paid on the judgment, and Clark to recover any damages resulting to him from the sale of his land, had the same been illegally sold; and it is said if his legal remedy was perfect, his grievances are not to be heard.

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by a court of equity. We have no doubt that an injunction may be granted against proceedings by execution on a satisfied judgment. *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65, on p. 69.

In the case under consideration, according to the complaint, part of the judgment had been paid for the judgment defendant by other parties, and there was a tender of the residue, with interest and costs. The judgment plaintiff refused the tender, and was proceeding to sell property on the execution. It would be strange if there was no relief by injunction in such a case. The position that the plaintiff can have no relief by injunction because the parties who made the payments for him on the judgment might sue Bowen, to recover the money back, and that the plaintiff might have an action for damages for the sale of his land on the satisfied judgment, can not be sustained.

It is probable that this proceeding might be sustained under section 377, p. 220, 2 G. & H., which provides, that "satisfaction of a judgment, or credits thereon, may be ordered for sufficient cause, upon notice and motion." Doubtless, on a proper complaint, the court might restrain proceedings on an execution during the pendency of such a motion by injunction, and on the final hearing make it perpetual.

A second objection to the complaint is, that it does not show a sufficient tender, because the costs accrued subsequently to the rendition of the judgment, and due to the clerk and sheriff, must likewise have been paid by the plaintiff in order to discharge him from the judgment. We think the allegation of tender sufficient. It is "that on the 4th day of February, 1870, he tendered to Bowen two hundred and thirty dollars, the balance due on the judgment, interest, and costs," etc. This language is sufficient to embrace all the costs, as well as the balance of the principal and interest of the judgment.

The defendants answered by a general denial. There was a trial by a jury and a finding as follows:

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"1. Has the judgment, set out in the complaint, been satisfied in manner and form as alleged in the complaint?

"Answer. Yes.

"4. Do you find for plaintiff or defendant?

"Answer. For the plaintiff."

The second and third interrogatories were not answered. The defendants moved the court for a new trial, which motion was overruled, and final judgment rendered for the plaintiff, perpetually enjoining further proceedings for the collection of the judgment.

The first reason for a new trial was the rejection of evidence offered by the plaintiff (defendant?) as to indebtedness of Colton to him, accruing subsequent to the last item mentioned in the complaint, which remained unsettled. This ruling was clearly correct. It was for the plaintiff to show by his evidence that the amounts alleged to have been paid on the judgment for him by Colton were so paid. The general denial required this. It was not material then what was the state of the accounts between Bowen and Colton. Whether, after balancing these accounts, Bowen owed Colton, or Colton owed Bowen, was wholly immaterial. The question was simply whether or not the payments made were made by Colton for the plaintiff and received by Bowen as payments on the judgment or not. It is urged also that the court erred in receiving testimony as to payments made on the judgment through Clark, Brandon & Co. We are not referred by counsel to that part of the record showing this ruling of the court, and after some search through the record we have failed to find it. See rule 19 of this court.

The next reason for a new trial was the giving of the following instruction: "The jury may infer from the conduct of the parties and the circumstances of the case, and what the parties said, an agreement between Colton and Bowen that the items mentioned in plaintiff's complaint were to be received by the defendant in satisfaction of his judgment, although no express verbal or written agreement whatever had been made between the defendant and Colton, at the time,

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that they should so apply ; that although there was a mutual running account between defendant and Colton which still remained unsettled, yet if the items mentioned in the complaint were furnished by Colton, with an understanding upon his part that they were to be payments on said Clark's judgment, and were received by the defendant knowing that Colton had such understanding, and not objected to by Bowen, this is evidence that they were payments on the judgment at the dates at which they were respectively furnished, although no express contract had been made between the parties that such application should be made, and although the quantity and value of such items had never been agreed upon between the parties ; that the fact that Colton was replevin bail upon the judgment was a circumstance that the jury might receive as evidence tending to show that the various items furnished by him were furnished and received as payments on said judgment ; that to constitute said several items payments upon said judgment, an agreement between the parties, either express or implied, must be shown."

We are unable to see any valid objection to this instruction. The court, in substance, informed the jury that there must be an agreement between the parties, either express or implied, that the items mentioned had been paid and received on the judgment, and that they might find such agreement "from the conduct of the parties, and the circumstances of the case, and what the parties said, * * * although no express verbal or written agreement whatever had been made between the defendant and Colton, at the time, that they should so apply."

The next reason relied upon for a new trial was, that the court had erred in giving this instruction: "That the alleged tender, if made in treasury notes of the United States, was a sufficient tender, so far as the kind of money is concerned, unless objection thereto was, at the time, made by the defendant, for the reason that the same was not in coin, and that a

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tender in any currency which is at par is a good tender, if no objection be made at the time."

The evidence shows that the money tendered was treasury notes of the United States. They are a legal tender. The tender was good, whether objection was made or not. *Reynolds v. The Bank, etc.*, 18 Ind. 467; *Thayer v. Hedges*, 23 Ind. 141; *Brown v. Welch*, 26 Ind. 116; *The Bank, etc., v. Burton*, 27 Ind. 426; *Legal Tender Cases*, 12 Wal. 457; *Dooley v. Smith*, 13 Wal. 604; *Bigler v. Waller*, 14 Wal. 297. There was no error in the instruction.

There are some further objections to the charge of the court, and to an illustration given by the court, but we fail to see any valid objection to the instructions.

The other reasons for a new trial are, that the verdict is contrary to law and not sustained by sufficient evidence. We can not disturb the judgment on these grounds. The evidence is such that the questions of fact must remain as decided by the jury.

The judgment is affirmed, with costs.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

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DESCENT.—Widow.—A. died, leaving a widow and one child, who inherited his real estate equally. The widow also died intestate, leaving said child by A. and other children by a former husband.

Held, that her portion of said real estate descended in equal shares to all her children.

From the Posey Circuit Court.

A. P. Hovey, and G. V. Mensies, for appellants.

E. M. Spencer and W. Loudon, for appellees.

DOWNEY, J.—The only question in this case is as to the

sufficiency of the complaint, to which a demurrer was filed and sustained in the circuit court. The facts stated in the complaint are, that on the 1st day of April, 1869, Joseph McHenry died intestate, the owner in fee simple of four-ninths of certain real estate in Posey county, Indiana; that he left surviving him, as his only heirs at law, his wife, Nancy McHenry, and Ellen McClanahan, his only child, the plaintiff herein; that afterward, in 1873, said Nancy McHenry died intestate, the owner in fee simple as heir at law of said Joseph McHenry, her late husband, of the one-half of four-ninths of said land; that said Nancy McHenry left surviving her the following named children, to wit: The plaintiff Ellen McClanahan, by said Joseph McHenry, and the defendants, by a former marriage with one John Thompson, deceased; that the defendants are setting up and claiming title to and in said one-half of said four-ninths of said land, the part of which said Nancy McHenry died seized, as heirs at law of said Nancy McHenry, with said Ellen McClanahan. Prayer that the defendants be enjoined, etc.

The facts, in short, are, that McHenry, the husband, died intestate, owning the real estate, leaving a widow, Nancy McHenry, and one child, Ellen McClanahan. The widow afterward died intestate, the owner of the land in question, so inherited from her husband, leaving as her children said Ellen McClanahan, the only child by McHenry, from whom she inherited the land, and two other children by John Thompson, a former husband. The question is, do the children by Thompson inherit from the mother equally with the child by McHenry, or does the child by McHenry inherit to the exclusion of the children by Thompson?

According to section 23, p. 295, 1 G. & H., if a husband die intestate, leaving a widow and one child only, his real estate shall descend, one-half to his widow and one-half to his child. This section controlled the descent of the real estate of Joseph McHenry, deceased, and vested one-half of it in his widow and the other half in his child Ellen. It is claimed by the learned counsel for the appellants, that the

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descent of the one-half of the property at the death of Nancy McHenry is controlled by section 6 of the statute of descents, which enables kindred of the half-blood to inherit equally with those of the whole-blood, but which forbids any except those who are of the blood of the ancestor from whom the property came, in case it came by gift, devise, or descent, from inheriting, etc. We cannot think that this section governs the descent in this case. There is no question of half-blood in the case. Nancy McHenry is the ancestor. From her the heirs must derive their title. The children are all related to her in equal degree, and each one has as much of her blood as any other. They are all her children, although one is by one husband, and two by another. The estate in this case is not impressed with the character of ancestral estate, so that the heir must be of the blood of Joseph McHenry. There is nothing in the statute which prevents the descent of the land owned by Nancy McHenry to all her children, although she obtained her title to it by descent from Joseph McHenry. According to the case of *Smith v. Smith*, 23 Ind. 202, the kindred referred to in the sixth section must be kindred of the person last seized, which in this case would be Nancy McHenry. It is evident that in this view of the case there are no kindred of hers of the half-blood. As to who are kindred of the half-blood, see *Robertson v. Burrell*, 40 Ind. 328.

In *McMakin v. Michaels*, 23 Ind. 462, this question was before the court, and it was said: "A widow inherits in fee, subject only to such qualifications as are prescribed by the statute of descents. Sections 18 and 24 contain such qualifications, but aside from these we know of no other provision which in any way modifies the rule of descent, that the real and personal property of any person dying intestate shall descend to his or her children in equal proportions. It is contended that section 6 is a modification of this canon of descent, but we do not think so." In *Coffman v. Bartsch*, 25 Ind. 201, the same question was decided in the same way.

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In *Aldridge v. Montgomery*, 9 Ind. 302, cited by counsel for appellant, there were kindred of the half-blood, and sec. 6, in one of its features, was properly applied to the case.

These cases have our entire approbation, and we must regard them as settling the question and putting it at rest.

The judgment is affirmed, with costs.

HACKNEY ET AL. v. WILLIAMS.

PRACTICE.—*Amendment During Trial.*—When the court permits an amendment of a pleading after the trial has commenced, the jury need not be re-sworn unless such amendment changes the issue.

PLEADING.—*Evidence.*—In an action between parties who had been partners, involving partnership transactions, the defendant answered that the plaintiff had received certain moneys of the firm which he had converted to his own use.

Held, that, under a general denial of such answer, the plaintiff might prove that the moneys so received by him had been expended for partnership purposes.

From the Johnson Circuit Court.

G. M. Overstreet and A. B. Hunter, for appellants.

S. P. Oyler and D. Howe, for appellees.

BUSKIRK, J.—This was an action on an account by appellee against appellants. The complaint was in three paragraphs. The first is for money alleged to have been received by appellants during a partnership between them and appellee for the training of horses, etc. The second is for work and labor, etc., by the appellee for appellants. The third is for one-half the value of a mare sold by appellants, and alleged to be the joint property of the parties.

The appellants answered in three paragraphs.

1. The general denial.
2. By way of set-off, that appellee was indebted to appellants for money paid him, for money paid for his use, and for work and labor, etc.

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The third was to the effect that during the partnership alleged in the complaint, appellants received certain sums of money belonging to the firm which were by them paid out for partnership purposes; and that during the same time the appellee received certain sums of money belonging to the said firm, which he failed to pay out or apply to partnership purposes, but converted the same to his own use.

The appellee replied in denial of the second and third paragraphs of the answer.

The cause was submitted to a jury for trial. After the jury had been sworn and some evidence heard, the appellee was, over the objection and exception of the appellants, permitted to amend his reply by filing an additional paragraph, to the effect that the money received by the appellee had been by him paid out on expenses incident to the partnership. The trial proceeded without the jury having been re-sworn, and resulted in a finding for the appellee. The appellants did not ask that the jury should be re-sworn, nor did they object to the trial proceeding without re-swearng the jury, but in their motion for a new trial they assigned as a reason, that the trial had proceeded after the amendment of the reply without re-swearng the jury.

The only errors relied upon by counsel for appellants in their brief are the amendment of the reply on the trial and the failure to re-swear the jury.

There was no error in permitting the amendment to be made on the trial. The court undoubtedly possessed the power to authorize the amendment. See sections 97, 98, and 99 of the code, 2 G. & H. 117 and 118; *Maxwell v. Day*, 45 Ind. 509.

It was not necessary to re-swear the jury unless the amendment changed the issues. *Maxwell v. Day, supra*. We think the amendment did not change the issues. The same proof was admissible under the general denial that was under the amended paragraph. The amended paragraph of the reply was addressed to the third paragraph of the answer, which alleged that the appellee had received certain sums

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of money belonging to the firm, which he had not applied to partnership purposes, but had converted the same to his own use. To sustain this paragraph of the answer, it was incumbent upon the appellants to prove the receipt of partnership funds and their conversion. The general denial controverted the truth of the matters averred in the answer. Under the general denial, the appellee was entitled to disprove whatever the appellants were required by the answer to prove, and as they were required to prove the conversion of partnership funds to the private use of the appellee, it was competent for him, under the general denial, to disprove a conversion, to show that he had applied such funds to partnership purposes. The amended paragraph of the reply neither increased nor diminished the proof, and consequently there was no change of the issues, and no necessity for re-swear^{ing} the jury.

The court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

WARD, GUARDIAN, v. ANGEVINE.

GUARDIAN.—Removal of.—Practice.—Appeal.—Pending a petition to remove the guardian of an insane person, on the ground that he had taken his ward to a neighboring state and was there keeping him, an order was made that such guardian should bring his ward within the jurisdiction of the court by a day fixed. Having failed to perform the order, a rule was entered at a subsequent term requiring the guardian to show cause why he should not be attached. To this he presented an answer, to which exceptions were filed and submitted. Without deciding the exceptions, the court summarily removed the guardian, and refused an application on his part to file an answer to the petition for his removal and to introduce his evidence. The court also refused the guardian's prayer for an appeal and refused to fix the penalty of an appeal bond or the time within which it should be filed.

Held, that on the exceptions to the answer to the rule to show cause, etc., the question of the removal of the guardian was not before the court, and that it

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was error to pass over the exceptions and summarily remove him without allowing him to file an answer and introduce his evidence.

Held, also, that the order of removal was a final judgment from which an appeal lay to the Supreme Court.

Held, also, that the court erred in refusing an appeal, and also in refusing to fix the penalty of the appeal bond and the time within which it should be filed.

PRACTICE.—*Pleading Struck Out*.—An answer struck out on motion is not a part of the record unless made so by a bill of exceptions.

SAME.—*Bill of Exceptions*.—Where no time beyond the term is given to file a bill of exceptions, it cannot be signed and filed at a subsequent term.

From the Dearborn Circuit Court.

J. Schwartz, for appellant.

O. B. Liddell, for appellee.

DOWNEY, J.—Ward, the appellant, was the guardian of James Angevine, a person of unsound mind, appointed by the Dearborn Common Pleas, on the 20th day of January, 1870. On the 25th day of October, 1872, James A. Angevine, the appellee, filed in the common pleas his petition, in which he represented that said James Angevine was, and for fifty-four years had been, a *bona fide* resident of, and domiciled in, Dearborn county, Indiana; that in January, 1870, after an inquest, Ward was appointed guardian of the person and estate of said James Angevine, gave bond, and was sworn; that at that time said James Angevine was and still is the owner of a farm and dwelling-house thereon, and then resided on said farm in said dwelling-house, with petitioner, who is his son, and who, with his wife and family, was then also residing with said James Angevine, the petitioner having then and there attended to the wants and necessities of the said James Angevine, and nursed and otherwise taken care of him. He further states that after his appointment as such guardian, to wit, on the 28th day of September, 1870, during the absence from home of said petitioner and his wife, who were then attending court upon a suit then pending in the Dearborn Circuit Court, which the said Ward, as such guardian, had instituted, in the name of said James Angevine, against the petitioner for the recovery of the possession of the said

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premises, where the said James Angevine then resided with petitioner and his family, the said Ward, without the consent or authority of said court of common pleas, and forcibly and without the consent of the said James Angevine, and without the consent of the petitioner, unlawfully removed the said James Angevine from his said dwelling and farm, and from the said county of Dearborn and State of Indiana, and beyond the jurisdiction and control of said court, and conveyed him to the State of Illinois, where said Ward has been since unlawfully keeping and detaining and still detains him. It is further stated that said James Angevine has no wife, but has children and grandchildren living, namely, James A. Angevine, etc., and that said Ward is not related to said James Angevine, nor in any way interested in his estate; that said James Angevine may and can be as well and as cheaply taken care of in said county of Dearborn as in the State of Illinois, or anywhere else, and that the petitioner is fully able and willing to support, maintain, and take care of him as cheaply as he has, since his removal, been supported, etc., in the the State of Illinois; that he is advised by counsel, believes, and says that there was not and is not any legal authority whatever for the removal of said James Angevine from said county and State, nor for his detention in the State of Illinois; wherefore he objects to any further allowance being made to said guardian or any one else for the maintenance and support of the said James Angevine while he has been, and is being, so unlawfully detained in the State of Illinois, and away from this county and the jurisdiction of said court, and that said Ward be ordered and compelled forthwith to bring the said James Angevine back to this county and State, within the jurisdiction of said court, and that the said Ward be removed from his trust as such guardian for his unlawful and unreasonable action and conduct in the premises. He states that he is willing to accept the appointment as guardian of the said James Angevine, and give the required bond, and maintain, support, and take care

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of him as well and as cheaply as the same can reasonably be done, or that some other fit and responsible person may readily be found in said county who would do so; wherefore he asks that either he or some other fit person may be appointed guardian of said James Angevine in the place and stead of said Ward, and for all other proper orders in the premises.

This petition was verified by the oath of the petitioner.

On the 9th day of November, 1872, the guardian filed an answer. On the 12th day of the same month, the plaintiff moved to strike out and reject the answer. On the 29th day of the same month, the court sustained the motion and struck out the answer, and the defendant excepted, as the clerk's entry shows. On the 7th day of December, 1872, the court made an order that the guardian, within two weeks from that date, bring his said ward, who was then in the State of Illinois, from there and return him to Dearborn county, and that the question as to the removal of the guardian be continued until the next term.

On the 30th of April, 1873, in the circuit court, the common pleas having been abolished, and its jurisdiction transferred to the circuit court, the petitioner moved the court for a rule against the defendant to show cause why he should not be attached, and on the 2d day of May, he filed his affidavit in support of the motion. The court sustained the motion, and ordered that the defendant show cause, on or before Wednesday of the second week of that term of the court, why he should not be attached for failing to comply with the rule made on the 7th day of December, 1872, by the common pleas. On the 7th day of May, 1873, the guardian showed cause, in a sworn answer, as follows: "Now at this time for answer to the order of the court made in this matter to show cause, if any he has, why he should not be attached for contempt of this court, and the order of said court made in the above matter by the common pleas, etc., on oath, says, he reiterates and states as true, and makes part of this his answer, his answer filed to the peti-

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tion in this matter at the November term, 1872, on the 9th day of November, 1872, in order that this court may be well advised of the premises; and also says, by way of premise and preface to his answer, that when he removed his ward to the State of Illinois, he did it with the full concurrence and advice of his principal attorney, etc., who advised, as a matter of right and policy, the removal of said ward to the residence of his daughter, where he now is; that no one connected with the interests of said ward contemplated at any time the ouster of the jurisdiction of this court over the person and property of said ward, nor is said ward detained at this time with intent to prevent the full exercise of the jurisdiction of this court, by the petitioner or any other person. He further states, that pursuant to the order of the said common pleas, at, etc., and within the time prescribed by the order, and as early as possible after the order was made, he went to the residence of said ward, in the county of LaSalle, Illinois, for the purpose of removing him to this county; that on the arrival of petitioner at said ward's residence, and on personal examination of the condition of said ward, physical and mental, and in connection with a regular practising physician, called for that purpose, he found it an impossibility to comply with the said order of the court; that it was and is the belief that said ward could not survive the trip to this county; and in support of which he submits the deposition of the daughter of his said ward, and his son-in-law, with whom he resides and is maintained, as also the deposition of Dr. Vance, and makes them part of this answer, which were taken in anticipation of a showing to be voluntarily made why the order had not been complied with. He disclaims any intention to be guilty of a contempt of court, and says that if the condition of said ward should change, so that a removal shall become possible, a compliance with the order of the court for his return will at once be made, and any other order of the court made, or to be made in the premises."

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Exception was taken to the answer of the defendant showing cause as follows :

1. Because the matters of fact in said answer and return set forth are insufficient in law to exculpate and exonerate the said Ward, guardian, from his said contempt of said order of said court in the premises.
2. Because it appears by said answer and return that the said Ward unlawfully removed said James Angevine from said county of Dearborn.
3. Because said Ward fails to show by his said answer and return that he has made any effort whatever, since the 17th day of December, 1872, to comply with said order, and to bring the said James Angevine back to said county of Dearborn, and within the jurisdiction of said court of common pleas and of this court.

On the 8th day of May, 1873, the court made this order :

"Now come the parties, and the court, being sufficiently advised in the premises, now summarily removes the said guardian from the trust on account of his misconduct in the premises, and that he make report and render a full account to the court of his doings in the premises, and deliver all moneys, choses in action, and other personal property in his possession and under his control to the person who may be appointed his successor in his said trust, to which rulings and orders of the court in the premises the said Jacob B. Ward excepts," etc.

On the 17th day of May, 1873, the guardian presented his bill of exceptions to the court, time having been given, which was signed and filed, and asked an appeal to this court, that the court fix the amount of the bond to be given, and the time within which it should be filed, "which leave to appeal this cause the court refused, and refuses to make any order concerning said bond as requested by said guardian at this time, to which rulings of the court the said guardian excepts, and now presents his bill of exceptions," etc.

This appeal was taken by obtaining and filing a transcript

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in the office of the clerk of this court, to which the appellee appeared.

The following errors have been assigned by the appellant:

1. Striking out the answer of the defendant to the petition for his removal.
2. Removing the guardian without trial and good and sufficient reasons or evidence, and at a time when the question of removal was not before the court.
3. In not deciding the matter of alleged contempt, but deciding the question of removal of the appellant instead.
4. In not permitting the appeal, and in entering the order against an appeal.

The appellee, for cross error, has assigned, that the circuit court erred in embracing in the first bill of exceptions herein the proceedings had in the common pleas, etc.

The first question presented is a motion by the appellee to dismiss the appeal. The ground of the motion as stated in the brief is, "because the assignment of errors does not comply with the rule requiring the page and line of the record to be therein referred to." We apprehend that counsel are mistaken in supposing that there is any such rule. Perhaps counsel refer to rule nineteen concerning briefs. It is a common mistake to suppose that in the assignment of errors reference must be made to page and line of the record, and also to suppose that it should be stated in the assignment of errors that the ruling assigned as erroneous was excepted to at the time. It is sometimes convenient to refer, in the assignment of errors, to the page and line of the record, but in no case necessary. It is wholly useless to say in an assignment of errors that there was an exception to the ruling. Such statement does not constitute an exception, when there was none, and does not add anything to one which was properly made at the time.

Again, a question is made as to what is properly in the transcript. The answer of the guardian to the petition, which was struck out, and not restored to the record by a

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bill of exceptions, cannot be regarded as any part of the record. This has been so often decided that authorities are unnecessary.

The question which counsel for the appellee attempts to present by a cross error necessarily arises in the record, without any cross error assigned. On the 29th day of November, 1872, the answer of the defendant was struck out, and no bill of exceptions was filed then or at any time during the term, nor was any time given in which to file it. The bill of exceptions by which it was attempted to present that question was signed by the judge of the circuit court and filed on the 17th day of May, 1873. It is quite clear, under these circumstances, that the question as to the correctness of the action of the common pleas in striking out the answer, which is the first error assigned, is not properly before us, and that it was not proper for the judge of the circuit court to sign a bill of exceptions relating to what had been thus previously done in the common pleas by the judge of that court. This is not because the circuit judge could not, in a proper case, sign a bill of exceptions showing a ruling of the judge of the common pleas, but because the judge of the common pleas could not himself have done so, if he had continued in office.

The second error assigned is the removal of the guardian, without trial, evidence, or cause shown. This exception to the proceedings of the court, we think, is well taken. In the common pleas, a rule was made that the guardian return his ward to Dearborn county. The court, at that time, continued the matter so far as it related to the removal of the guardian. Subsequently, the petitioner showed to the court, by affidavit, that the guardian had not complied with the order, which he was directed to do in two weeks, and a rule was then entered that he show cause why he should not be regarded in contempt and an attachment issued against him. He showed cause by an answer filed, accompanied by certain depositions showing the condition of health of his ward at a prior date, as an excuse for not having complied with the order. Excep-

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tions were taken to this answer, and the question whether the exceptions were well taken or not was submitted to the court for its decision. Without deciding this question, the only one then before the court, an order was made by which the court "summarily removed the said guardian from the trust on account of his misconduct in the premises." This part of the case was not yet before the court for its decision. The question was, whether or not the guardian had shown sufficient cause why he should not be attached. The bill of exceptions informs us that the guardian, upon this ruling by the court, asked that, before the entry should be made of his removal, he be granted leave to amend his answer to show cause why he should not be removed, which leave the court refused to grant. He also asked that, before the entry be made and instead of said order, an entry be made that he file his further answer why he should not be removed, and that evidence be heard in the matter, and that he be allowed to show why he should not be removed, all of which was refused by the court. We think this action of the court cannot be sustained. We need not decide now whether the showing made by the guardian against the issuing of an attachment was sufficient or not, for the reason that that question has not been decided by the circuit court, and as to that there is nothing for us to re-examine.

What we have already said will sufficiently indicate the opinion of this court as to the third alleged error.

The facts in support of the fourth error, as stated in the bill of exceptions, are as follows :

"And the said defendant, guardian," etc., "then requested of the court that an appeal from the order removing said guardian be granted to the Supreme Court of the State of Indiana, on such terms and conditions as to the court might seem right and proper, and that the court fix the amount of bond required of said guardian; that the time of filing the bond be fixed by the court, to stay proceedings; and the said guardian asked that, on filing such bond, proceedings be stayed pending such appeal. But the court refused to make

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an order fixing the amount of the appeal bond and the filing of the same or any order regarding the same, and refused to grant an appeal as prayed, for the reason that the order heretofore made in this cause removing said guardian is not a final judgment from which an appeal will lie, nor will it be such final judgment until another guardian is appointed and qualified, and no appeal is granted until such guardian is appointed," etc.

In our opinion, this ruling of the court was erroneous. The order of removal, which we have already copied in this opinion, was unconditional, and at once put an end to the guardianship, and deprived the guardian of any right to act further as such. It is true that the court, in connection with the order of removal, directed that the guardian should account. But this accounting was not to be to his successor but to the court, as the order reads. But why should the guardian account to a successor, when the very question to be first decided is, whether he shall account to any one. It was wholly immaterial, so far as the finality of the order of removal is concerned, whether any successor was ever appointed or not. It may be a question, however, whether it is an error that should reverse a judgment, because an appeal in one mode has been refused, where the party has the right to appeal, and actually does appeal, in another mode. This question we need not now decide.

The judgment is reversed, with costs; and the cause is remanded, for further proceedings.

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PRACTICE.—*Conflict in Testimony.*—Where there is a direct and irreconcilable conflict in the testimony, the weight of the evidence is for the jury, and the Supreme Court will not disturb the verdict.

From the Greene Common Pleas.

J. D. Alexander, for appellants.

H. Burns, for appellees.

BU SKIRK, J.—This was an action by the appellants against Benjamin F. East, John J. Combs, and the heirs of Sarah A. Watson, deceased, to enforce a vendor's lien on certain real estate owned by the said John J. Combs.

There was issue, trial by a jury, finding for the defendants, and, over a motion for a new trial, judgment on the verdict.

The error assigned calls in question the action of the court in overruling the motion for a new trial. The material facts are: The appellants sold to Sarah A. Watson certain real estate, and in part payment therefor she executed her note payable to Sarah Good for ninety-five dollars. The appellants conveyed such land and placed the grantee in possession. There was no mortgage taken or personal security given on such note. Afterward, the said Sarah A. Watson sold and conveyed such land to Benjamin F. East, who purchased with full notice that the purchase-money was unpaid; and as a part of the agreement he undertook and promised to pay to the appellants the note of the said Sarah A. Watson. He paid thirty dollars thereon. Subsequently East sold and conveyed the said land to John J. Combs, who was placed in possession and owned the same when this action was commenced. The complaint alleged that Combs purchased the land with knowledge of the facts hereinbefore stated. This was denied by Combs, who claimed to be a purchaser for value, and without any knowledge that the purchase-money from Watson to appellants was unpaid, or that East had agreed, as a part consideration of his purchase, to pay the said sum of money to the appellants. This was the issue to be tried, and the only issue, for it was and is conceded that the appellants had a vendor's lien on said land in the hands of Sarah A. Watson or Benjamin F. East.

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We are asked to reverse the case upon the weight of the evidence. Mrs. Good testified with great certainty and positiveness to a state of facts which very clearly showed that Combs was a purchaser with notice that she held a lien on such land for unpaid purchase-money. She testified that shortly before Combs purchased the land from East, he came to her house and offered to purchase, at a discount, her note on Mrs. Watson, and that she refused to take less than its face, because she held a lien on such land.

Combs testified that when he purchased the land he had no knowledge of the existence of such note, and that he never went to the house of Mrs. Good and offered to purchase said note.

Mrs. Good testified that her daughter, Elizabeth, who then resided in the State of Illinois, was present when she and Combs had their conversation, but her testimony was not produced on the trial.

There were other facts and circumstances proved upon the trial which very strongly tended to corroborate the evidence of Mrs. Good; and while we may think the evidence preponderated in her favor, we cannot, for that reason, reverse the judgment, without violating the long and well settled practice of this court. There was a direct and irreconcilable conflict in the testimony. The weight of the evidence was for the jury, and we cannot disturb their verdict. *The Madison, etc., Railroad Co. v. Taffe*, 37 Ind. 361, and cases there cited.

The judgment is affirmed, with costs.

46	496
127	539
46	426
138	106
138	186
139	91
46	426
141	600
46	426
147	211
46	426
166	107

BALDWIN ET AL. v. KERLIN ET AL.

SPECIFIC PERFORMANCE.—*Uncertainty in Contract.—Parol Evidence.*—Suit by A. and B. against C. and D. for specific performance of the following contract:

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"**MESSRS. A. AND B.—Gents:** We will give you our woollen mills, with all the appurtenances thereunto, situated in the north-west corner of public square in the town of Franklin, Indiana, for six hundred and forty acres of land in Anderson county, Kansas, one thousand dollars cash, five hundred dollars in six months, without interest; each party to pay the taxes on their property for 1870.

"Franklin, April 7th, 1871.

C. & D."

"We accept the above proposition.

A. & B."

Held, that parol evidence was inadmissible in such case, first, to describe the real estate, and then to apply the description.

Held, also, that evidence offered to show that the premises of C. & D. were not in the public square in the town of Franklin, nor adjoining it, would contradict the writing, and be inadmissible.

Held, also, that there being no description of the land in Anderson county, Kansas, nor any mode agreed upon by which the lands intended could be identified, parol evidence to show what land was intended, or to permit A and B. to select what lands they pleased, would be to make a new and different contract for the parties.

Held, also, that the contract was too vague and uncertain as to the description of the property proposed to be exchanged to be aided and the property identified by parol evidence.

PLEADING.—Complaint to Correct Mistake.—A complaint to correct a written contract on the ground of a mistake, and to enforce it, wherein it is averred, in a very general and indefinite way, that by the mistake, inadvertence, or neglect of the scrivener drawing it up, and without any fault of the plaintiff, the contract does not fully set forth the agreement of the parties, without showing in what respect or particular it fails to set forth the agreement, what words are omitted that it was agreed should be inserted, or what words are inserted contrary to the intention of the parties, is bad.

SAME.—Mistake.—A mistake that can be corrected in such case must have been a mutual mistake of fact. It is not enough that one of the parties was mistaken.

From the Johnson Circuit Court.

S. P. Oyler and D. Howe, for appellants.

T. W. Woollen, C. Byfield, G. M. Overstreet, and A. B. Hunter, for appellees.

BUSKIRK, J.—This was an action, originally commenced in the Johnson Circuit Court, at the September term, 1871, by appellants against appellees, John and Joseph, and their wives, Rachel and Sarah Kerlin, and Horace Allen. The complaint is in two paragraphs. The facts averred in the first paragraph are substantially as follows: That on the

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7th day of April, 1871, appellants were and still are the owners, and possessed of certain real estate, of the value of six thousand four hundred dollars, described in the paragraph, situate in Anderson county, Kansas ; being all the real estate then owned by them in said county, and being the same referred to in Exhibit A as " six hundred and forty acres of land in Anderson county, Kansas ;" that at the date aforesaid appellees John and Joseph Kerlin were the owners of certain real estate of the value of ten thousand dollars, and including certain woollen mills and appurtenances thereon situate, in Johnson county, Indiana, described in the paragraph as part of lots forty-two and forty-three, in the original plat of the town (now city) of Franklin ; that said lots forty-two and forty-three adjoin the north-west corner of the public square of said city of Franklin, said woollen mills being situate on the west end of said lots, now about sixty feet distant from the north-west corner of the square aforesaid ; that said real estate was all then owned by said appellees John and Joseph Kerlin, in the city of Franklin, and is the same referred to in Exhibit A, as " our woollen mills, with all the appurtenances thereunto, situated in the north-west corner of the public square, in the town of Franklin ;" that at the date aforesaid, appellants and appellees John and Joseph Kerlin entered into an agreement, whereby appellants agreed, in consideration of the conveyance to them by said Kerlins of said woollen mills and appurtenances, to convey to said Kerlins said land in Anderson county, Kansas, to execute a note for five hundred dollars, payable without interest at six months after the date thereof, and also pay to said Kerlins one thousand dollars cash ; that in pursuance of said agreement, a written contract was entered into by the appellants, by the name and style of Baldwin & Payne, and appellees Kerlins, under the name of J. & J. Kerlin, of the tenor following :

" MESSRS. BALDWIN & PAYNE: *Gents*, We will give you our woollen mills, with all the appurtenances thereunto, situ-

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ated in the north-west corner of public square, in the town of Franklin, Indiana, for six hundred and forty acres of land in Anderson county, Kansas, one thousand dollars cash, five hundred dollars in six months, without interest, each party to pay the taxes on their property for 1870.

"Franklin, April 7th, 1871. J. & J. KERLIN."

"We accept the above proposition.

"BALDWIN & PAYNE."

That appellants have always been and still are ready to perform their part of the contract; that on the 11th day of April, 1871, they tendered the Kerlins a warranty deed, duly stamped, for the Kansas land, a note, duly stamped, for five hundred dollars, due on or before October 7th, 1871, and one thousand dollars in United States treasury notes, and demanded performance of the contract by the Kerlins on their part, which they refused to perform, and have ever since refused, to appellants' damage ten thousand dollars; that appellee Allen claims some interest, the nature of which is to the appellants unknown, in said woollen mills and appurtenances. The paragraph concludes with a prayer for specific performance, and also the usual prayer for all proper relief.

The second paragraph alleges substantially all the facts averred in the first paragraph, and in addition the following: "That one Joseph Garshwiler was employed by the Kerlins to reduce the agreement to writing; that he did draw up the contract set forth in exhibit A, purporting and intended to be executed in compliance with and to embody said agreement, but by mistake, and without any fault of appellants, said written contract did not fully set forth the agreement of the parties, but was nevertheless signed and executed by all the parties thereto in good faith, all supposing that said written contract was conformable to and embodied their agreement; that afterward appellee Horace Allen purchased said woolen mills and appurtenances, and received a conveyance thereof from the Kerlins; and at the time of the payment

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to them by him of the purchase-money, he had full knowledge of their agreement with appellants, and of all the facts before stated." The paragraph contains, besides the usual general prayer, a prayer, in the alternative, for specific performance, or, in the event that the court shall deem the facts not sufficient to warrant such a decree, then for damages.

Copies of the written contract, deed, and note are filed as parts of both the first and second paragraphs, marked "exhibit A." Afterward, on the 6th day of February, 1872, appellants filed a supplemental complaint against appellee Deloss Root. The supplemental complaint alleges that since the filing of the original complaint, appellee Root purchased of appellee Allen an interest in the woollen mills, etc. It concludes with a prayer that Root be made a defendant to answer as to his interest, and that he may be bound by the decree, etc.

At the September term, 1872, all the appellees appeared, and the following demurrers were filed, all for the fifth statutory cause :

1. A joint demurrer to the complaint by all the appellees.
2. A joint demurrer to the complaint by John and Joseph Kerlin.
3. A joint demurrer to the complaint by Rachel and Sarah Kerlin.
4. A separate demurrer to the complaint by Horace Allen.
5. A separate demurrer to the original and supplemental complaint by Deloss Root.

All the demurrers were sustained; to the ruling sustaining all and each of which appellants at the time excepted. Appellants declining to amend, judgment was rendered accordingly against appellants, and in favor of appellees, for costs. The errors assigned are :

1. The sustaining of the joint demurrer to the complaint of all the appellees.
2. The sustaining of the joint demurrer of appellees John and Joseph Kerlin to the complaint.

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3. The sustaining of the separate demurrer of appellee Allen to the complaint.

4. The sustaining of the separate demurrer of appellee Root to the original and supplemental complaints.

Three questions are discussed with marked ability by counsel, and they are :

1. Is the contract susceptible of enforcement, as it reads ?
2. Should the contract be reformed, as asked ?
3. If the contract is reformed as prayed for, should it be enforced ?

The questions discussed under the first proposition are, whether the description of the mill property is sufficient to be enforced ; and if not, may the description be aided by parol evidence ?

Is the contract as it now reads susceptible of enforcement, or is it void on account of the defective description of the property to be exchanged ? An agreement to convey lands will not be enforced unless it "contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." Browne Stat. Frauds, sec. 371.

The same learned author says : "It must, of course, appear from the memorandum, what is the subject-matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified." Browne Stat. Frauds, sec. 385, and authorities there cited.

It has been held by this court, that in an action to enforce specific performance of a contract for the conveyance of land, if the contract states sufficiently every other fact required in such a contract by the statute of frauds, but fails to clearly identify the land to be conveyed, by an intelligible description, but contains a description which, so far as it goes, is consistent, such ambiguity may be explained, and the defective description made complete by extrinsic parol evidence, provided the necessary averments are contained in the com-

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plaint on such contract; in other words, where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract. *Colerick v. Hooper*, 3 Ind. 316; *Dingman v. Kelly*, 7 Ind. 717; *Torr v. Torr*, 20 Ind. 118; *Howell v. Zerbee*, 26 Ind. 214; *Guy v. Barnes*, 29 Ind. 103; *Nolte v. Libbert*, 34 Ind. 163. To the same effect are 2 Phill. Ev., 4 Am. ed., p. 682, *et seq.*; 1 Greenl. Ev., secs. 297, 298; *Miller v. Travers*, 8 Bing. 244; *Maggart v. Chester*, 4 Ind. 124; *Nichols v. Johnson*, 10 Conn. 192; *Waring v. Ayres*, 40 N. Y. 357.

But courts never permit parol evidence to be given, first to describe the land, and then to apply the description. *Ferguson v. Staver*, 33 Penn. St. 411, and authorities there cited. Nor do courts ever permit parol evidence to be given to contradict the written agreement, but only in aid of it. *Torr v. Torr, supra*.

It will be observed in the case at bar, that the contract describes the premises of Kerlins to be in the public square in Franklin, Indiana. The public square is a well defined portion of the city plat. The complaint which seeks to enforce this contract shows that the premises are not in the public square, nor even adjoining it. To permit this kind of evidence would be to contradict the written agreement, and to furnish a new and different description. It is proposed to prove that the Kerlins owned woollen mills on lots forty-two and forty-three, in the original plat of the city of Franklin; that the lots adjoined the north-west corner of the public square, separated, of course, by the street, and that the mills are on the west ends of these lots. Such proof would not aid the description given in the written agreement, but would contradict it. If the description had been "our woollen mills in the city of Franklin," it might have been shown that they owned but one woollen mill in such city, and might have shown where it was situated. This would have been consistent with the description, as far as it went, and would have

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been in aid of it, and would not have contradicted the written agreement, nor would it have made a new and different description. *Colerick v. Hooper, supra*; *Waring v. Ayres*, 40 N. Y. 357.

But how are the six hundred and forty acres of land in Anderson county, Kansas, to be identified? There is no description of the land, nor is there any mode agreed upon by which the lands intended can be identified and described. It is not described as the land owned in the county named by Baldwin and Payne, nor as such lands as they, or some other person named, might select out of the lands owned by them; but simply six hundred and forty acres, without any description or mode of selection. In *Carpenter v. Lockhart*, 1 Ind. 434, the description of the land was very defective, but it was held sufficient, because there was in the instrument a mode agreed upon of selecting the lands intended. To permit parol proof to show what land was intended, or to permit Baldwin and Payne to select any lands they pleased, would be to make a new and different contract for the parties. Suppose that the Kerlins had performed the contract on their part, and had brought an action to compel specific performance on the part of Baldwin and Payne, what land would they have been required to convey, and how could it have been identified and described?

In *Howell v. Zerbee*, 26 Ind. 214, the property was described as "the mill and machinery located on the following real estate, to wit: situated in the county of Starke, and State of Indiana, a part of lot 3, section 36, in township 33, range 4 west, containing five acres;" and the court held the description defective. The court say: "It contains a patent ambiguity, in not defining the particular part of lot 3 intended, and there is nothing in the description by which the part intended can be ascertained and rendered certain. It is therefore void for uncertainty."

In the above case, it was certain that there was five acres of ground upon which the mill was erected, and that such

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ground constituted a part of lot 3, sec. 36, township 33, range 4 west; and yet no parol evidence was permitted to show what particular piece of land was intended, although it may have been fenced in as a part of the mill property. If parol evidence was not admissible in the above case, because it would be supplying a description which had been omitted, why and upon what principle can the description in the present case be shown or aided by parol? So, in *Dingman v. Kelly*, 7 Ind. 717, there was nothing in the description which indicated the particular tract of land intended to be leased, and there was no attempt at description except to give the name of the county and State where the land was situated; the court would not permit the omission to be supplied by parol; and if not to supply an omission, will it be allowed to change one description, which is plain and unambiguous, to another that will fit the case?

We are of opinion that the contract set out in the first paragraph of the complaint is too vague and uncertain as to the description of the property proposed to be exchanged; and that such description cannot be aided, or the property identified, by parol evidence. The court committed no error in sustaining the demurrer to the first paragraph of the complaint.

We proceed to inquire whether the facts stated in the second paragraph of the complaint entitled the appellants to a reformation of the contract. The second paragraph alleges that on the 7th day of April, 1871, the plaintiffs were the owners of six hundred and forty acres of land in Anderson county, in the State of Kansas, which is described according to the congressional survey; that on said day the defendants Kerlins were the owners of a woollen mill, situated on certain described lots in the city of Franklin, Indiana; that on said day the parties agreed to exchange the said property upon the terms and conditions set out in the proposition and acceptance. The paragraph then alleges: "That one Joseph Garshwiler was, by said defendants, employed to reduce said

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agreement to writing; that said Garshwiler did, on the day and year last above mentioned, draw up a contract, a copy of which is hereunto annexed, marked 'Exhibit A,' purporting and intended to be executed in conformity with, and to embody the verbal agreement aforesaid; whereas, by the mistake, inadvertence, or neglect of said scrivener, Garshwiler, and without any fault of plaintiffs, said written contract did not fully set forth the agreement of the said parties," etc. It is then averred that it was signed by the parties in good faith, they believing it expressed their verbal agreement.

In *Nevius v. Dunlap*, 33 N. Y. 676, this language is used: "To entitle a party to the decree of a court of equity, reforming a written instrument, he must show, first, a plain mistake, clearly made out by satisfactory proofs. * * In the second place, he must show that the material stipulation which he claims should be omitted or inserted in the instrument, was omitted or inserted contrary to the intention of both parties, and under a mutual mistake." To the same effect are the following authorities: Story Eq., secs. 152-157; *Waterman v. Dutton*, 6 Wis. 265; *Newton v. Holley*, 6 Wis. 592; *Lake v. Meacham*, 13 Wis. 355; *Fowler v. Adams*, 13 Wis. 458; *Harrison v. The Juneau Bank*, 17 Wis. 340; *Powell v. Smith*, Law Rep. 14 Eq. Cas. 85; *Nelson v. Davis*, 40 Ind. 366; *Allen v. Anderson*, 44 Ind. 395.

In *Nelson v. Davis*, *supra*, the court say: "But there is, if possible, a still more fatal defect in the answer. It is not alleged that anything was omitted in the deed that was directed to be inserted, or that anything was inserted, by mistake or otherwise, contrary to the direction of the parties."

In *Allen v. Anderson*, *supra*, the court say: "The mistake must be one of fact, and not of law. It must be shown that words were inserted that were intended to be left out, or that words were omitted which were intended to be inserted."

It is very obvious, from the foregoing authorities, that the

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allegations of the second paragraph of the complaint, in reference to the mistake, are wholly insufficient, and fatally defective. It is averred, in a very general and indefinite way, that by the mistake, inadvertence, or neglect of the scrivener, and without any fault of the plaintiffs, such written contract did not fully set forth the agreement of the said parties. In what respect, or in what particular, did it fail to set forth the agreement of the parties? What words were omitted which it had been agreed should be inserted? or what words were inserted contrary to the intention of the parties? Did the omission relate to the description of the property proposed to be exchanged? and if it did, what description had been agreed upon? Or did it relate to some other stipulation of the agreement? and if so, to what stipulation? Was the mistake a mutual one? It is not sufficient that one of the parties should have been mistaken. *Nelson v. Davis, supra.* And if there was a mutual mistake, was it a mistake of fact or of law? From the peculiar and cautious averments of the complaint in reference to the mistake, we are strongly inclined to the opinion that the parties were more mistaken in reference to the legal effect of the agreement, than they were in reference to what was in the agreement. We cannot well see how they could have been mistaken in reference to what was in the agreement. It was very brief. It was obvious to the most casual observer that there was no description whatever of the land in Kansas, and no mode adopted of making a selection or ascertaining the description, and a very imperfect description of the property in the city of Franklin. We think the complaint wholly fails to show that there was any mistake of fact. The Kerlins made a written proposition, which was accepted by Baldwin and Payne. It is insisted with great earnestness and force, by counsel for appellees, that there cannot be any mutual mistake of fact, where the contract, as in the present case, is made up of a proposition on the one part, and an acceptance on the other; but we do not find it necessary to decide such question.

We have, after very careful and mature consideration,

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reached the conclusion that the court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

Opinion filed November term, 1873; petition for a rehearing overruled May term, 1874.

JENKINS *v.* RATCLIFFE ET AL.

From the Posey Circuit Court.

J. Pitcher and H. C. Pitcher, for appellant.

E. M. Spencer and W. Loudon, for appellees.

PETTIT, J.—The appellant brought this suit against the appellees, to recover the possession of certain lands. There was an answer of general denial, under which all defences may be given in evidence in such a case as this. 2 G. & H. 283, sec. 596. The case was tried by the court, and resulted in a general finding for defendants.

The only question in the case is as to the sufficiency of the evidence to sustain the finding. We have carefully read and examined it all, and think it fully warranted and sustains the finding, and that the finding ought not and could not legally have been otherwise. It clearly shows that the defendants, and those under whom they claim, had been in possession for more than thirty-five years, cultivating and claiming title to it against all persons. The plaintiff himself testified that he knew that the title to the lands had been in dispute for about twenty-five years.

The judgment is affirmed, at the costs of the appellant.

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THE CITY OF CRAWFORDSVILLE *v.* IRWIN ET AL.

MECHANIC'S LIEN.—Personal Liability.—*Notice to Building Committee of City Council.*—A notice to the members of a building committee of the common council of a city, that the persons giving the notice have filed a lien on a building being constructed by the city under the supervision of the committee, and that said members will be held liable to a certain amount for brick furnished for said building, will fix no personal liability on the city.

SAME.—Defect in Notice.—Such personal notice must show to whom the materials have been sold.

PLEADING.—Complaint on Mechanic's Lien.—A complaint to enforce a mechanic's lien must show that the notice of lien was filed within sixty days after the completion of the building. An averment that the notice was filed within sixty days after the money was to have been paid is insufficient.

MECHANIC'S LIEN.—Uncertainty in Notice.—Notice of an intention to hold a mechanic's lien on a part of lot No. 110, and the improvements thereon, in the original plat of a city named, is radically defective for uncertainty in the description.

SAME.—Pleading.—Complaint.—A complaint to enforce a mechanic's lien for materials furnished to the contractor must show the amount due. An averment that a notice of lien to a certain amount was filed is not equivalent to an averment that that or any other amount was due.

From the Montgomery Circuit Court.

J. E. McDonald, J. M. Butler, and J. M. Cowan, for appellant.

WORDEN, C. J.—This action was brought by Volney Q. Irwin and Tilghman J. Lehr against Robert Alexander, Benjamin Whitset, and the city of Crawfordsville. The object of the action was to recover from the defendants the value of certain brick sold and delivered by the plaintiffs to the defendants Alexander and Whitset, and to enforce a lien against the city upon real estate. Such proceedings were had as that judgment was rendered against the city for the debt and for the enforcement of the supposed lien. From this judgment, the city appeals, and has assigned, amongst other alleged errors, that the complaint does not state facts sufficient to constitute a cause of action against her. This assignment of error makes it proper that we should first examine the complaint, and if found radically defective as against the city, it will be unnecessary to consider any questions involved in the subsequent proceedings.

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The complaint was in four paragraphs. The first alleges, in substance, that Alexander and Whitset were employed by the city to erect a brick building, for the city, on part of lot No. one hundred and ten (110) on the original plat of the town (now city) of Crawfordsville; that the plaintiffs sold and delivered to Alexander and Whitset one hundred and eighty thousand bricks, at seven dollars and fifty cents per thousand, for said building; that the plaintiffs, within sixty days after the money was to have been paid for the brick, filed and caused to be recorded in the proper recorder's office the following notice, viz.:

"To all whom this may concern, notice is hereby given that the undersigned intend holding a lien upon the following real estate and the improvements thereon, belonging to the city of Crawfordsville, described as follows: part of lot No. 110 in the original plat of the city of Crawfordsville, to secure the payment of thirteen hundred and fifty (\$1,350) dollars, per bill as follows, for materials: October 16th, 1872, one hundred and eighty thousand brick at seven dollars and fifty cents per thousand, thirteen hundred and fifty dollars.

"Witness our hands and seals this 17th day of October, 1872.

IRWIN & LEHR."

The paragraph further alleges that the plaintiffs served upon Robert E. Bryant, Lucas A. Foote, and H. H. Crist, the building committee appointed by the common council of the city, the following notice, viz.:

"CRAWFORDSVILLE, October 17th, 1872.

"R. E. Bryant, L. A. Foote, H. H. Crist, Gents: This is to notify you that we have filed a lien on the engine house now in course of construction in this city, and we will hold you for amount, thirteen hundred and fifty (\$1,350) dollars, now due us for brick furnished for said building.

"IRWIN & LEHR."

It is further averred that the common council of the city, after they had notice of the filing and recording of the lien as aforesaid, paid Alexander and Whitset the sum of four thousand dollars for work and labor on said building; that

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the sum above specified as due to the plaintiff's remains due and unpaid; wherefore, etc.

Section 649 of the statute on the subject of mechanic's liens (see *Barker v. Buell*, 35 Ind. 297, where the entire provisions are collected) provides for a personal action in certain cases, by the sub-contractor, material man, etc., against the owner, by giving the notice therein specified. But it is clear that the notice addressed to Bryant and the other members of the building committee does not fix a personal liability upon the city. This notice not only does not state to whom the brick were sold, in other words, who were the debtors of the plaintiffs, as would seem to be required by the statute, but it does not notify any one that the plaintiffs would hold the city liable for the claim. It purports, on its face, to notify the persons to whom it was addressed that the plaintiffs would hold them liable. The obvious and unmistakable purpose of the notice was to inform the persons to whom it was addressed that the plaintiffs had filed a lien. If the lien fails, the action fails, as no foundation is laid by this notice for a personal action against the city. This brings us to the lien itself.

Section 650 of the act provides, that "any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, within sixty days after the completion of the building or repairs, notice of his intention to hold a lien upon such property for the amount of his claim," etc. It does not appear by the averments that the notice was filed within sixty days after the completion of the building. The averment is, that the notice was filed within sixty days after the money was to have been paid for the brick. This may or may not have been within sixty days after the completion of the building. But, besides this, we regard the notice of the lien as radically defective for uncertainty in the description of the property. Whether the uncertainty could have been cured by averment, we need not decide, as no averments having that object were made. "A part of lot No. 110" is descriptive of no

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particular property. What part of the lot, or how much of it, can not be determined. Under this description, what would the sheriff sell or the purchaser buy? The case of *Howell v. Zerbee*, 26 Ind. 214, is exactly in point. There the court say: "We think, to constitute a valid lien under the statute, that the lot or land on which the building is situated should be described with such certainty that it may be definitely ascertained and located. Here the description is, 'a part of lot 3, section 36, township 33, range 4 west, containing five acres, situated in Starke county, and State of Indiana.' It contains a patent ambiguity, in not defining the particular part of lot 3 intended, and there is nothing in the description by which the part intended can be ascertained and rendered certain. It is therefore void for uncertainty." See, also, the cases of *The Eel River Draining Association v. Topp*, 16 Ind. 242, *Munger v. Green*, 20 Ind. 38, and *Cochran v. Utz*, 42 Ind. 267. We conclude for these reasons that the error is well assigned as to the first paragraph of the complaint.

We come to the second. This paragraph, as we understand it, does not purport to set up any cause of action against the city. It alleges an accounting between the plaintiffs and Alexander & Whitset of and concerning the brick delivered for the building of the engine house and of the money paid thereon, and that there was found due the plaintiffs the sum of one thousand and twenty-seven dollars and fifty cents, and that the defendants Alexander & Whitset executed to the plaintiffs the following order on the city, which the city refused to accept, viz.:

"To the City Council:

"GENTS.—You will please pay V. Q. Irwin one thousand and twenty-seven dollars and fifty cents for brick delivered for the engine house.

"Crawfordsville, December 6th, 1872.

"ALEXANDER & WHITSET."

The paragraph concludes: "Wherefore the plaintiffs say that said defendants Alexander & Whitset are indebted

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to them in the sum of one thousand and twenty-seven dollars and fifty cents, which remains wholly unpaid; wherefore the plaintiffs demand judgment," etc.

It is clear that this paragraph sets up no facts that constitute a cause of action against the city.

The third paragraph does not allege that the plaintiffs furnished Alexander & Whitset any brick for the building, but alleges that the plaintiffs "for the purpose of securing the payment of their claim against said defendants Alexander & Whitset, and securing the payment of such judgment as they might obtain against said defendants, and to prevent, if possible, the payment of money by said city council, which might under other circumstances be due to said defendants, caused notice of their intention to hold a lien on said premises and building to the amount of thirteen hundred and fifty dollars, for materials furnished for said city building, which said notice of lien was duly filed and recorded in the recorder's office of said county, in pursuance of the statute in such cases made and provided, of which the said city of Crawfordsville had due notice; wherefore the plaintiffs pray," etc. This paragraph is radically defective, and is scarcely intelligible without reference to the preceding ones. Without adverting to other defects, it may be observed that it is not alleged that the sum of thirteen hundred and fifty dollars, or any other sum, was due from Alexander & Whitset. It alleges that the plaintiffs filed a notice of their intention to hold a lien for that amount, but this is not equivalent to an allegation that that or any other amount was due them from Alexander & Whitset. Nor does it appear that the notice was filed within the time required after the completion of the building, and no copy of the notice is set out.

The fourth paragraph alleges, in substance, that Alexander & Whitset were employed by the city to erect the building on part of lot No. 110; that the plaintiffs sold and delivered to Alexander & Whitset one hundred and eighty thousand brick for the building, at the price of seven dollars and fifty cents per thousand, amounting to thirteen hundred and fifty

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dollars, which sum remains due and unpaid ; that the plaintiffs, at the time there was due from the city to Alexander & Whitset the sum of four thousand dollars on account of the building, gave the notice which has been hereinbefore set out, addressed to R. E. Bryant and the other members of the building committee, who are alleged to have been members of the common council, and regularly appointed by the mayor and common council of the city as the building committee for the city ; that notwithstanding the notice, the city, disregarding the rights of the plaintiffs, and subsequently to said notice, paid to Alexander & Whitset the sum of four thousand dollars on account of said building ; wherefore, etc.

The question arising under this paragraph is whether the notice addressed to R. E. Bryant, L. A. Foote, and H. H. Crist above set out, can be regarded as a notice to the city that the plaintiffs would hold her responsible for the amount of their claim, and whether such notice is sufficient for that purpose. In addition to what we said on this subject in considering the first paragraph of the complaint, it may be observed that if the notice was intended for any other purpose than to notify those to whom it was addressed that the plaintiffs had filed their notice of intention to hold a lien on the premises, it was to notify them, and not the city, that they intended to hold them personally responsible. The paper can not, without perverting its terms and adding to its contents, be construed as a notice to the city that the plaintiffs would hold her responsible. There is, therefore, no good cause of action against the city stated in this paragraph of the complaint.

The error that the complaint does not state facts sufficient to constitute a cause of action against the city is, in our opinion, well assigned, and the judgment against her must be reversed.

The judgment against the city is reversed, with costs, and the cause remanded, for further proceedings not inconsistent with this opinion.

Sample *v.* Gilbert.

SAMPLE *v.* GILBERT.

PRACTICE.—*Appeal from Judgment of Justice of the Peace after Thirty Days.*

A defendant who was personally served with process in a suit before a justice of the peace, and who suffered judgment to go against him by default, procured an order of the court of common pleas for an appeal more than thirty days after the rendition of the judgment. His affidavit showed that he paid the costs two days after judgment, and supposed the default had been set aside, and was waiting for the justice to fix a time for the trial of the cause; that he "had no other idea than defending the suit;" that the note on which judgment was rendered had been paid, and that he was not aware that the default had not been set aside until the day of making the affidavit.

Held, that the appeal was improperly granted and should have been dismissed. The payment of the costs did not of itself operate to vacate the judgment. That could only be done on the defendant's motion, and he made no motion to that effect before the justice.

From the Delaware Circuit Court.

T. J. Sample and W. March, for appellant.

OSBORN, J.—By the record in this case, it appears that the appellant recovered a judgment against the appellee by default, before a justice of the peace, on the 15th day of May, 1871, after personal service of the summons by reading; that on the 17th day of the same month the appellee appeared before the justice, and paid the costs in full. He did not move to set aside the default or for a new trial, or take any other action in the case until the 23d day of June of the same year, when he appeared in the common p'leas court and on his motion, supported by his own affidavit, obtained an order upon the justice to send up a transcript of the proceeding and judgment, and all the papers in the cause. On the 24th of the same month, he filed before the justice an appeal bond in the case, and afterward filed a transcript of the proceedings and papers in the common pleas court. On the calling of the cause, the appellant moved to dismiss the appeal. His motion was overruled, and he excepted. The cause was finally tried by the court, resulting in a finding for the appellee, and, over a motion for a new trial, judgment was rendered against the appellant for costs.

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The affidavit upon which the appellee's motion for the appeal was granted states that he did not know, at the time of the rendition of the judgment, that any suit was pending against him; that immediately thereafter he went to the justice, and for the purpose of having the default set aside, paid up the costs, and supposed that the default was set aside, and was waiting for the justice to fix a time for the trial of the cause, "and had no other idea than defending the suit;" that the note upon which it was brought had been fully paid; that he was not aware but that the default had been set aside until the day of making the affidavit, when the officer came and demanded property of him, on an execution issued upon the judgment.

The affidavit does not show that the appellee was prevented from taking the appeal "by circumstances not under his control," within thirty days after the rendition of the judgment, as required by sec. 68, 2 G. & H. 597.

He states in his affidavit that he paid the costs, for the purpose of having the default set aside, but he failed to make his purpose known to the justice of the peace. He made no motion. "Such judgment by default may be set aside, on motion, * * on payment of all costs," etc. Sec. 62, 2 G. & H. 593. The justice had no right to set aside the default until asked to do so. He might well suppose that the judgment debtor was paying a part of the judgment. The judgment was rendered on the 15th of the month. On the 17th he paid the costs, and he certainly could, with ordinary diligence, have learned that the default had not been set aside in time to take an appeal before the expiration of thirty days from the rendition of the judgment.

There was no ground for granting the appeal, and the motion to dismiss ought to have been granted. *Welch v. Watts*, 9 Ind. 450; *Tucker v. Makepeace*, 14 Ind. 186.

This is not like the case of *Brooks v. Harris*, 42 Ind. 177. There the service was by copy, and the defendant had no knowledge of the pendency of the action until too late to

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appeal. In this case, the defendant had notice of the judgment the second day after its rendition.

The judgment of the said Delaware Circuit Court is reversed, with costs. The cause is remanded, with instructions to said court to dismiss the appeal.

CONNELL *v.* THE STATE.

CRIMINAL LAW.—*Indictment.—Selling Liquor to Person in the Habit of Getting Intoxicated.*—An indictment for selling intoxicating liquor to a person in the habit of getting intoxicated need not name the kind of liquor sold.

SAME.—The use in the indictment of the word “being” instead of the word “getting,” used in the statute defining the offence, will not render the indictment bad.

From the Fayette Circuit Court.

W. Morrow, N. Trusler, and B. F. Claypool, for appellant.

J. C. Denny, Attorney General, for the State.

PETTIT, J.—This was an indictment for selling liquor to a person in the habit of getting intoxicated, and the charge and description of the offence is thus stated:

“Maurice Connell did then and there unlawfully sell to one Joseph Hergott certain intoxicating liquor, to wit, one gill thereof, at and for the price of ten cents; he, the said Joseph Hergott, being then and there a person in the habit of being intoxicated.”

It is objected to the sufficiency of the indictment, that it does not state the kind of liquor sold, and that “being” is substituted in the indictment for the word “getting,” used in the sixth section of the act under which this prosecution was had. *Acts 1873*, p. 154.

We think these objections are not well taken. It has been held by this court, under former acts on the same sub-

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ject, which did not, in terms, say that the kind of liquor need not be named, that it was not necessary to name the kind of liquor sold in an indictment for selling.

The act under which this prosecution is had (Baxter Bill) expressly says, that the kind of liquor need not be named; and we think the failure to state the kind of liquor does not in any way hinder, vex, or incumber the defence.

As to the other point, we think a person cannot be in the habit of "being" intoxicated without being in the habit of "getting" intoxicated, and that the use of the one for the other is not a defect that would justify quashing the indictment.

There was a plea of not guilty, trial by the court, finding of guilty, motion for a new trial overruled, and judgment on the finding.

It is objected that the evidence does not warrant or justify the finding. We do not think so. We have read and considered the evidence, and think it reasonably and fairly sustains the finding and judgment.

The judgment is affirmed, at the costs of the appellant.

SMATHERS v. THE STATE.

INSTRUCTIONS TO JURY.—Evidence.—Where the evidence is not in the record, but instructions are shown to have been given to the jury that are clearly erroneous under any supposable state of facts, the judgment will be reversed.

SAME.—Criminal Law.—Larceny.—Possession of Stolen Goods.—On a trial for larceny, where the possession by the prisoner of the property alleged to have been stolen has been proved by the State as a circumstance to establish guilt, it is error for the court to assume, in its charge to the jury, that such property was stolen, and then to charge that its possession by the defendant in a short time thereafter raised a presumption that he stole it, which if not explained by him would authorize the jury to find a verdict of guilty.

Possession of Stolen Goods.—Evidence.—A party in possession of personal property is presumed to be the owner; but when it is proved that the property

46	447
130	208
46	447
148	187
148	524
143	703
150	76

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has been stolen, and it is found, recently after the larceny, in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession, and if he fails to satisfactorily account for such possession or gives a false account, the presumption arises that he is the thief. Such possession may be explained, either by direct evidence or the attending circumstances, or by the character and habits of life of the possessor, or otherwise, but if not explained in some one of these modes, the evidence of guilt is deemed conclusive.

From the Wayne Criminal Circuit Court.

H. C. Fox, for appellant.

J. C. Denny, Attorney General, for the State.

BUSKIRK, J.—The appellant was convicted in the court below of the crime of larceny. The indictment charged the stealing of sundry articles of wearing apparel and a satchel. The court overruled a motion for a new trial, and rendered judgment on the verdict.

The appellant has assigned for error the overruling of the motion for a new trial. The evidence is not in the record. The only error relied upon for a reversal of the judgment is the giving of the third and fourth instructions. It is contended by counsel for appellant that such instructions are clearly erroneous under any supposable state of facts, and that in such case this court will reverse the judgment, presuming that the jury was misled thereby, and that too whether the evidence is in the record or not.

Such seems to be the settled rule of practice in this court. *Murray v. Fry*, 6 Ind. 371; *Eward v. The Lawrenceburgh, etc., Railroad Co.*, 7 Ind. 711; *Woolley v. The State*, 8 Ind. 502; *The New Albany, etc., Railroad Co. v. Callow*, 8 Ind. 471; *Jolly v. The Terre Haute, etc., Co.*, 9 Ind. 417; *Ruffing v. Tilton*, 12 Ind. 259.

We proceed to consider the instructions complained of, with the view of determining whether they are erroneous under any supposable state of evidence. The third instruction is as follows:

"3. If the property stolen, or a portion of it, was found in the possession of the defendant in a short time after the-

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larceny was perpetrated, it would raise a presumption that the defendant stole the property; but the strength of the presumption which it raises against the accused depends upon all the circumstances surrounding the case. The presumption of guilt may be overcome by the accused, by evidence that raises a reasonable doubt that he came by it as charged; but if the possession of the stolen property, on the day or the day following the perpetration of the larceny, is not explained by the defendant, you might, in your discretion, find the defendant guilty as charged."

The objection urged to the above instruction is, that it assumes that the property had been stolen. A defendant is presumed to be innocent, until the contrary is proved. Sec. 104 of the criminal code, 2 G. & H. 415. A person in the possession of personal property is presumed to be the owner and rightfully in its possession; but when it is proved that property has been stolen, and the same property, recently after the larceny, is found in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession; and if he fails to satisfactorily account for such possession, or gives a false account, the presumption arises that such person is the thief. But the burden of accounting for the possession of property is never imposed until it has been shown that the property has been stolen; and the presumption of guilt from possession does not arise, unless the person is required and fails to satisfactorily account for his possession of such property. The jury were required in the first place to determine whether there had been a larceny of the goods or a portion of the goods described in the indictment; and if they found that a larceny had been committed, then they were required to determine whether the person charged in the indictment was guilty. The possession of the goods by the accused raised no presumption of a larceny, but the larceny being proved by other evidence, the possession by the accused imposed upon him the duty of showing how he came by the goods,

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and his inability to show that he came by them honestly raised the presumption that he was the thief. The jury had no right to assume that a larceny had been perpetrated, but were required to so find from the evidence. The court, in charging the jury, had no right to assume that a fact existed which the jury were required to find from the evidence. *Conaway v. Shelton*, 3 Ind. 334; *Ball v. Cox*, 7 Ind. 453; *The Cincinnati, etc., Railroad Co. v. Clarkson*, 7 Ind. 595; *Hackleman v. Moat*, 4 Blackf. 164; *Reynolds v. Cox*, 11 Ind. 262; *Swank v. Nichols' Adm'r*, 24 Ind. 199; *The Jeffersonville Railroad Co. v. Swift*, 26 Ind. 459.

The court should have charged the jury that if they found from the evidence that the goods described in the indictment, or some portion of them, had been stolen, and that such stolen property had been found in the exclusive possession of the defendant within a short time after the larceny was perpetrated, such possession imposed upon the defendant the duty and burden of explaining his possession; and if he has failed to satisfactorily account as to how he came by the stolen property, or has given a false account of how he came into possession of such stolen property, the law presumes that the defendant stole such property, and this presumption was strong enough to justify them in finding the defendant guilty.

In our opinion, the instruction was erroneous in three particulars :

1. It assumed that the property had been stolen.
2. The jury were told that the possession of the property by the defendant, within a short time after the larceny had been perpetrated, raised the presumption that the defendant had stolen the property, when the jury should have been told that the failure of the defendant to satisfactorily account as to how he came into possession of such stolen property raised the presumption that he had stolen the property.
3. The jury were told "that if the possession of the stolen property, on the day or the day following the perpetration of the larceny, is not explained by the defendant,

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you might, in your discretion, find the defendant guilty as charged."

If the jury found from the evidence that the property described in the indictment, or some portion of it, had been stolen, and that such stolen property was, on the day of the perpetration of such larceny or the day following, found in the exclusive possession of the defendant, who had failed to satisfactorily account as to how he had come into possession, or who had given a false account of his possession, the imperative duty of the jury was to find the defendant guilty, unless such possession was explained by the attending circumstances, or unless the character or habits of life of the possessor, or otherwise, raised a reasonable doubt in the mind of the jury of the guilt of the accused. Greenleaf says: "As men generally own the personal property they possess, proof of possession is presumptive proof of ownership. But possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession; and if unexplained either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive. This rule of presumption is not confined to the case of theft, but is applied to all cases of crime, even the highest and most penal." 1 Greenleaf Ev. 39, sec. 34. That is, that the recent and exclusive possession of stolen property, unexplained in some of the modes above pointed out, becomes conclusive. In such case, the jury has no discretion, but must convict.

The fourth instruction was in these words:

"4. If you find from the evidence that the stolen property was found in a house or stable which did not belong to the accused, and over which he had no control, and find no actual possession, by the defendant, of the property, this fact would not be sufficient to raise the presumption of guilt; but if you find that the accused visited the house or stable wherein the stolen goods were found, about the time or soon after the property was found, and examined the place where they had been concealed, this would be a proper cir-

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cumstance for you to take into consideration with the other facts of the case, in determining upon the guilt or innocence of the accused."

This instruction, like the third, assumed that the goods in question had been stolen, and for this reason was erroneous.

In *Turbeville v. The State*, 42 Ind. 490, this court said: "It is well settled by elementary writers on criminal law and many adjudged cases, that the possession of stolen property, to be sufficient to put a party in whose possession it was found upon his defence, must be both recent and exclusive." The court, after reviewing the authorities, uses this language: "The evidence having shown that the possession was not exclusively in the appellant, no presumption could be indulged against him, nor was he required to satisfactorily account for the presence of the goods in the place where they were found."

It results, that if the house or stable, where the goods in the present case were found, did not belong to the appellant, and was not under his exclusive control, he was not required to account for the presence of the goods where they were found, and no presumption from possession could be indulged against him.

The appellant might have visited and examined the place where the goods were concealed, in such a manner and under such circumstances as to make the latter clause of the above instruction correct, and in the absence of the evidence we are bound to presume that the instruction was applicable to the facts proved.

If the appellant visited and examined the place where the goods were concealed, in a secret and clandestine manner, it was a proper circumstance to be considered by the jury, as tending to show his connection with the larceny, not upon the ground that the goods were in his possession, but upon the ground that his knowledge of the place of concealment raised a presumption that he was guilty of the larceny of such goods. The appellant might have visited and examined the place of concealment in such a manner and under

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such circumstances as would have created no presumption against him, but, in the absence of the evidence, we cannot indulge any presumption unfavorable to the action of the court below, where the action could be correct in any supposable state of facts.

For the errors pointed out in the instruction given, the judgment must be reversed.

The judgment is reversed, with costs; and the clerk is directed to immediately certify this opinion to the court below, and to issue his order to the warden of the state prison for the return of the prisoner to the jail of Wayne county, for a new trial, in accordance with this opinion.

BELL *v.* THE STATE.

CRIMINAL LAW.—Circuit Court.—Affidavit and Information.—The circuit court cannot try a charge of felony upon an affidavit and information filed in that court.

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136 576

SAME.—Larceny.—Evidence.—On the trial of a prosecution for larceny, the evidence must show that the thing alleged to have been stolen was the property of the person alleged.

From the Hamilton Circuit Court.

T. J. Kane and *A. F. Shirts*, for appellant.

J. C. Denny, Attorney General, and *J. Stafford*, Prosecuting Attorney, for the State.

DOWNEY, J.—The appellant, on affidavit and information filed against him in the circuit court, was charged with, and convicted of, grand larceny. His motion to quash the affidavit and information and also a motion for a new trial were overruled.

The judgment must be reversed on two grounds:

1. The defendant could not be tried on an affidavit and

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information filed in the circuit court. *The State v. Justice, ante*, p. 210.

2. The evidence, as set out in the bill of exceptions, does not prove that the property alleged to have been stolen was the property of the person named in the information. *Jackson v. The State*, 19 Ind. 312; *Baker v. The State*, 34 Ind. 104; *Mullinix v. The State*, 43 Ind. 511; *King v. The State*, 44 Ind. 285.

The judgment is reversed, and the cause remanded, with instructions to quash the affidavit and information. The clerk will certify to the warden of the state prison.

ADAMS v. THE BOARD OF COMMISSIONERS OF WHITLEY COUNTY.

COUNTY TREASURER.—*Fees for Disbursing Special School Tax.*—County treasurers are entitled to one per cent. for collecting and disbursing special school taxes.

SAME.—*Over-Payment by Mistake.*—When, by mistake, ignorance of his rights, or oversight, the treasurer has made a full settlement with the county board, without receiving the commission allowed him by law for the collecting and disbursing of such taxes, he may maintain an action to recover such compensation, if the board, on his claim being properly presented, refuse to allow it.

SAME.—*Voluntary Payment.*—The doctrine of voluntary payments is not applicable to such a case, but the rights of the treasurer and the duty of the board of commissioners are governed by sec. 120 of the assessment law, 1 G. & H. 101.

SAME.—*Case Criticised.*—In the opinion in *Shoemaker v. The Board, etc.*, 36 Ind. 175, the scope and effect of said section 120 were limited and restricted too much.

From the Whitley Circuit Court.

D. C. Chipman, M. A. Chipman, and J. B. Black, for appellant.

A. Y. Hooper and W. Olds, for appellee.

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BUSKIRK, J.—The only question arising in the record is as to the sufficiency of the complaint, to which a demurrer was sustained in the court below. The complaint was in these words:

"John O. Adams, plaintiff, complains of the commissioners of Whitley county, Indiana, defendants, and says, that the plaintiff was treasurer of Whitley county during the years 1867, 1868, 1869, and 1870, duly elected and qualified as such; that during the period aforesaid he collected and disbursed special school tax to the amount of thirty-one thousand three hundred and ninety dollars and ninety-one cents, the same being county revenue, upon which he was entitled to a fee of one per cent. by law; but by mistake, oversight, and ignorance of his rights and title to the same, he was not allowed his fees of one per cent. aforesaid, at any settlement made with the commissioners of said county; that the same remains due and wholly unpaid; that a bill of particulars of the same is filed herewith; that he paid over and accounted to said board, by oversight and mistake, during his said several settlements, for more money than was justly due from him on account of county revenue, and that by said oversight and mistake he paid over to the said county fund the sum of three hundred and twelve dollars and eighty-eight cents, his money and fees aforesaid; that as soon as he discovered said over-payment he demanded the payment of the same from the commissioners back to him, which they refused to pay; wherefore," etc.

Two questions are discussed by counsel. First, was the appellant entitled to a fee of one per cent. for collecting and disbursing the special school tax? Second. Can the appellant, conceding that he was entitled to such per cent., after having settled with the board of commissioners and paid over all the money in his hands, recover the same back from the county?

Both questions were involved and expressly decided in favor of appellant in *Myrick v. The Board of Commissioners of Montgomery Co.*, 33 Ind. 383. Counsel for appellee seek

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to distinguish that case from this, by showing that in that case the money was paid under protest, while in the present case it was voluntarily paid. In that case, the first paragraph of the complaint was the same as in the present case. The facts were identical, except in that case an allowance was asked in the last settlement, while here it was not asked until after settlement and payment of the money.

In that case, the second paragraph alleged that said board was indebted to him in the sum of one hundred dollars for so much money paid by him to said board, against his protest, in his final settlement with said board, the same being ten per cent. penalty added to taxes amounting to one thousand dollars returned delinquent, which had been paid and returned delinquent through mistake of plaintiff.

We are urgently asked to overrule that case. The decision of the case depended upon the construction to be placed upon various sections of the school law. The case seems to have received careful and thoughtful consideration. The various sections were analyzed and compared, and the unanimous conclusion was reached that the treasurer was entitled to recover. If we ever doubted the correctness of the decision, we would hesitate to reopen the question. The school law is subject to such frequent changes by the legislative department that the judiciary should be very slow in unsettling anything that has been settled in reference thereto. The overruling of that case would open the floodgates of litigation. It has been acted upon as the law in the most of the counties in the State in the settlements between county treasurers and the boards of commissioners. The construction placed upon the school law, in that case, seems to be fair, reasonable, and just. We feel it to be our duty to adhere to it.

In our opinion, the question, which has been so fully and ably discussed by counsel, in regard to the law governing voluntary and compulsory payments, does not arise in the record. The repayment of money to county treasurers where the

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same has been improperly paid is regulated by statute. Section 120 of the assessment law reads as follows :

"Whenever it shall appear to the board doing county business in any of the counties of this State, that by reason of erroneous charges on the tax duplicate, or from any other cause, the treasurer of such county has paid and accounted to said board for more money than was justly due from him on account of county revenue, said board doing county business shall direct the auditor to credit said treasurer with the sum or sums thus improperly paid, and order the same to be refunded from the county treasury." 1 G. & H. 101.

Section 121 provides that when similar improper payments have been made to the treasurer of state, the board shall cause the auditor to certify to the auditor of state such improper payment, and the auditor of state is required to credit and allow the same as a claim against the treasury, and the treasurer is required to pay the same out of any money not otherwise appropriated.

Section 122 reads : "The provisions of the two preceding sections shall extend to persons who have been, as well as those who are now, and shall hereafter be, county treasurers."

The court was required in *Shoemaker v. The Board, etc.*, 36 Ind. 175, to place a construction upon the above sections, where it said : "We think that it is quite clear, that the above sections have no application to the case under consideration. The manifest purpose of the legislature was to provide a cheap and speedy remedy, without resort to a regular suit in the courts, for such erroneous charges and mistakes in calculations as might, and frequently do, occur, in making out duplicates and collecting taxes. It was intended to meet and provide for individual and occasional instances of erroneous charges and miscalculations ; that the sections above quoted were not intended to apply to and govern a case like the one under consideration, where an illegal tax had been assessed against the almost entire body of tax-payers in a county."

In the preparation of the opinion in the above case, the attention of the court was mainly called to section 121,

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which it was claimed afforded a remedy in that case, and the principal purpose was to show that such section did not apply to the case then in hand. The scope and legal effect of section 120 was limited and restricted too much by what was said by the writer of the opinion. What was then said was limited to the words "by reason of erroneous charges on the tax duplicate," and the words "or from any other cause" were overlooked. The phrase "or from any other cause" is very comprehensive, and embraces a case like the present, where the treasurer from ignorance of his rights paid out and accounted for money which he had the right to retain for his services in collecting and disbursing the special school tax.

It was held in the above case that the remedy provided for obtaining money which had been improperly paid into the state treasury is a special one, and must be strictly pursued, and did not contemplate a resort to the courts, except by *mandamus* to compel a performance of duty by the officer named. That statement related solely to sec. 121.

It is provided by section 120 that where a county treasurer has paid and accounted to the board doing county business for more money than was justly due from him on account of county revenue, the board shall direct the auditor to credit the treasurer with the sum or sums improperly paid, and order the same to be refunded from the county treasury. This contemplates an application to the board for the relief therein provided for, and if such relief is refused the treasurer may either appeal or bring an independent action. Sec. 10 of the act relating to allowances by county boards, 1 G. & H. 65.

It appears from the complaint that the appellant presented his claim to the board, who refused to allow the same, and thereupon he brought this action.

In *Myrick v. The Board, etc., supra*, it was held that the special school tax constituted a part of the county revenues, as under our laws all taxes were embraced in either state or county revenue.

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Adhering as we do to the ruling in that case, we must hold that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

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144	193
46	459
154	612
154	615

CRIMINAL LAW.—*Bigamy.*—*Evidence.*—*Admissions of Defendant.*—In a prosecution for bigamy, it is competent to prove the former marriage by the admissions and declarations of the defendant.

SAME.—*Instruction.*—*Criminal Intent.*—In a prosecution for bigamy, it is proper to charge the jury that if they believe from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care, and made due inquiry, to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, then they should find for the defendant.

SAME.—*Reasonable Doubt as to Life of First Wife.*—In a prosecution for bigamy, the State must prove beyond a reasonable doubt that the first wife was living at the time of the second marriage. Where there is no direct evidence on this point, and the only evidence is, that the first wife was alive two years previous to the second marriage, the presumption of the continuance of her life is neutralized by the presumption of the innocence of the defendant, and in such case there can be no conviction.

SAME.—*Evidence.*—In a prosecution for bigamy, it is not error to admit in evidence the marriage license, and the return made thereon by the clergyman who performed the marriage ceremony at the second marriage.

From the Daviess Circuit Court.

J. W. Burton and J. W. Ogden, for appellant.

J. C. Denny, Attorney General, for the State.

BUSKIRK, J.—This was a prosecution for bigamy. The appellant, upon a plea of not guilty, was tried by a jury and

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found guilty, and over motions for a new trial and in arrest, judgment was rendered on the verdict.

The motion in arrest of judgment calls in question the sufficiency of the indictment. Counsel for appellant have failed to point out any objection to the indictment, and we are satisfied, after a careful examination of it, that it is good.

The motion for a new trial was based upon the admission of incompetent evidence, the insufficiency of the evidence to support the verdict, and the refusal of the court to give certain instructions asked by the appellant.

The first and third reasons will be considered together. The only evidence offered by the State to prove the former marriage of the appellant consisted of his admissions. The first admissions proved were made before his second marriage. The second were made to the officer who arrested him. The third, when he was arraigned before a justice of the peace upon such charge, he pleaded guilty. A certified transcript of the proceedings before the justice was read in evidence. Upon the trial, the appellant asked the court to charge the jury as follows:

"1. That the admissions of the defendant of the former marriage is not sufficient proof of itself of the former marriage to warrant the jury in finding the defendant guilty."

The question is therefore presented for our decision, whether, in a prosecution for bigamy, it is competent to prove the former marriage by the admissions and declarations of the defendant.

Such proof was held to be competent and sufficient by this court in the case of *The State v. Seals*, 16 Ind. 352. But it is earnestly contended by counsel for appellant, that the ruling in that case is not supported by the weight of authority, and we are asked to overrule it.

In our opinion, the ruling in the above case is fully supported by the weight of authority. It is settled by authority in England, Canada, Maine, Pennsylvania, Delaware, Virginia, South Carolina, Georgia, Alabama, Texas, Ohio, Iowa,

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and California, that the defendant's admissions of a former marriage may be given in evidence upon a prosecution for bigamy to prove the fact of such marriage, and that such admissions were sufficient to prove the former marriage. In Massachusetts, Minnesota, Connecticut, and New York, a contrary doctrine has been expressed.

The cases supporting the positions above stated will be found collected in note g, to sec. 2630, pp. 811 and 812, 2 Whart. Crim. Law. See, also, cases collected in note A, p. 721, 3 Chitty Crim. Law.

We think the admissions of the appellant were properly admitted in evidence to prove the fact of his former marriage; and that the court committed no error in refusing to give the above instruction.

The appellant requested the court to give the following instruction: "That if the jury believe, from all the evidence in the case, that the defendant married the second time in the honest belief that his former wife had been divorced from him, they should find him not guilty;" but the court refused to so charge, and this refusal was assigned as a reason for a new trial, and is relied upon here to reverse the judgment.

The appellant testified in his own behalf. The substance of his testimony was, that he left the State of New York about two years ago and came to this State, where he had resided ever since; that he left his wife in the city of Buffalo, in the State of New York, she refusing to come west with him; that he came to Washington, Daviess county, Indiana, in July, 1873, where he had ever since resided, and still resides; that he had not been in the State of New York since he left there, two years ago, but he had received letters from his parents and brothers in the State of New York, informing him that his wife Elizabeth had procured a divorce from him in said State of New York; and that he had married the said Ruth Summers under the belief that such information was true.

Bishop on Criminal Law, in sec. 303, vol. 1, p. 187, says: "The wrongful intent being the essence of every crime, the

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doctrine necessarily follows, that, whenever a man is misled without his own fault or carelessness, concerning facts; and, while so misled, acts as he would be justified in doing were the facts what he believes them to be, he is legally innocent, the same as he is innocent morally."

The same author, in his work on Statutory Crimes, in sec. 355, p. 234, says: "In the cases mentioned in the preceding sections, there is no crime, because, by a rule of the common law, there can be none where the criminal mind is wanting. But the reason why it is wanting in these cases is, that, either in consequence of a technical rule, or by force of a natural fact, it is impossible the criminal mind should exist; since that cannot be for whose existence there is no capacity. But there may be a capacity for the criminal intent, while yet no crime is committed, even though the outward fact of what otherwise were crime transpires. It is so where one, having a mind free from all moral culpability, is misled concerning facts. If, in such a case, he honestly believes certain facts to exist, and, though they do not, acts as he would be legally justified in acting if what he erroneously believes to be were real, he is justified in law, the same as he is in morals. The books are full of illustrations of this doctrine; and the reader perceives that, in reason, it must govern statutory crimes, the same as crimes at the common law."

The same author, in sec. 356, illustrates the above doctrine as applicable to a prosecution for bigamy, when he says: "But this exception has no relation to a case in which, on independent information and special grounds, a husband or wife is really believed to be dead. Suppose, for example, a husband, intending to entrap his wife, goes out ostensibly on a sail with confederates, and they come back and represent that he is drowned, while he secretly escapes abroad; she believes the statement, administers on his effects, and at the end of a year marries. Then he returns and procures her indictment for polygamy. On a just consideration, the common law rule, and not the statutory one, prevails, and she should be acquitted."

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The same rule would apply to the dissolution of the marriage relation by divorce as by death.

We think the court should have charged the jury, if it had been so asked, that if they believed from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, they should find him not guilty.

There was probably no error in refusing the instruction as asked, as it was based solely upon the belief of the defendant, and did not require that such belief should be the result of due care and careful inquiry, and that he should have reasonable grounds to entertain such belief.

It is next contended that the appellant was improperly convicted, because there was no evidence that his former wife was alive at the time of his second marriage. The statute upon which this prosecution is based provides, that "if any person, being married, shall marry again, the former husband or wife being alive, and the bond of matrimony still undissolved, and no legal presumption of death having arisen, such person so offending shall be deemed guilty of bigamy," etc. Sec. 46, 2 G. & H. 452.

The indictment in the present cause charged that the first wife of the appellant was alive at the time of his second marriage, and that no presumption of death had arisen. If there had been direct proof that the first wife was alive at the time of the second marriage of the appellant, and that he was aware of such fact, the presumption of her death would have been unimportant. But there was no direct proof that she was alive at such time. It therefore becomes necessary to inquire whether there was any presumption of her death, and if there was, whether such presumption was strong enough to overcome the presumption of the innocence of the appellant.

Bishop, in his work on Statutory Crimes, in sec. 611, p. 403.

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says: "Concerning one further question, the practitioner should be on his guard. Suppose the first husband or wife is not directly shown to have been alive at the time of the solemnization of the second marriage, but at some point of time anterior thereto, under what circumstances is death to be presumed? If the absence had continued for seven years, the law, both by its common law rules and by the statute, presumes death; but, even then, there is no presumption as to the particular time when it took place, especially there is none that life continued up to within a day of the expiration of the seven years. Now, under the combined operation of the polygamy statute and of the common law, if a man's wife abandons him, and a year afterward, having no information whether she is dead or alive, he marries another woman, he, in point of law, does not commit polygamy should it turn out that she is really dead; but, should it turn out that she is alive, he does. Then, suppose he is indicted for polygamy, and, at the trial, there is no evidence whether she is dead or alive, except that she was alive a year before the second marriage, what is the result? If, at the time of the trial, seven years have elapsed, and the woman has not been heard from, the law presumes that, now, she is dead, but it has no presumption as to the time of the death. The law, however, presumes the defendant to be innocent; and it would seem, on this state of the case, that, as there is no presumption of the life having continued even a year after the separation, the court should direct an acquittal. If, on the other hand, seven years have not elapsed at the time of the trial, then the presumptions of life and of innocence operate together, the one for the defendant and the other against him. They neutralize each other, and the jury must act on other presumptions and evidence, and decide, as matter of fact, between them all. Perhaps there is not sufficient authority carrying the point in the former supposed instance to the full extent there intimated; but, at least, a verdict of acquittal in such a case would, on the authorities, and certainly in reason, be preferred."

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In *Rex v. The Inhabitants of Twynning*, 2 B. & Ald. 386, where a woman, whose husband twelve months previously had left the country, married again, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the duration of life. BEST, J., said: "The cases cited are very distinguishable; they only decide that seven years after a person has been last heard of, you are in all cases to presume his death. But they do not shew, that where conflicting presumptions exist, you may not presume the death at an earlier period. Now, those conflicting presumptions exist here, and I think the sessions were warranted in presuming the death of the first husband, on the ground that they would not presume that the woman had committed bigamy."

But the observations of BAYLEY and BEST, JJ., in the above case, with respect to conflicting presumptions, were questioned by the court in *Rex v. The Inhabitants of Harborne*, 2 A. & E. 544, where it was decided that the court of Quarter Sessions were right in presuming that the first wife was living, although such presumption led to the conclusion that the husband had been guilty of bigamy. The court did not, in this case, say that the decision in the above case was wrong, but they observed that there was no absolute presumption in favor of innocence such as to override all other presumptions; and they put the case of a man being shown to be alive a few hours before the second marriage, as one in which the presumption that he was alive at the time of the second marriage would clearly be made. And it is to be observed that the circumstances of the two cases differed so much as to fully justify the court in coming to opposite conclusions on them.

In *Regina v. Lumley*, Law Rep. 1 C. C. Res. 196, which is the latest English case on the subject under examination that we have been able to find, LUSH, J., speaking for the whole court, observed: "In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury

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that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. . The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way."

In the present case, there was no direct evidence that the first wife of the appellant was living at the time of the second marriage. It was proved by the admissions of the appellant that she was alive two years previous to the second marriage. There was no evidence as to her age or health, which have a controlling influence in the case of conflicting presumptions. It is true that the appellant testified that he had received letters to the effect that his wife had obtained a divorce from him, in the State of New York, but the dates of such letters are not given. If such letters are to prejudice the appellant on the point of the presumption of death, then they were entitled to greater weight than they received as to his good faith in believing that she had obtained a divorce from him prior to the second marriage. The case, as submitted to the jury, stood thus: The State was required to satisfy the jury beyond a reasonable doubt, either by direct proof or presumptions arising from facts proved, that the first wife was living at the time of the second marriage. There was no direct evidence. The presumption of the continuance of life was neutralized by the presumption of the innocence of the defendant. Bishop says, in such a case, the jury must act on other presumptions or evidence. There are no presumptions of law. There was no evidence as to the age or health of the first wife to strengthen the presump-

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tion of the continuance of her life. The case was submitted to the jury without either direct evidence or a presumption to establish that she was alive at the time of the second marriage. Without such proof, there could be no conviction, for there was no crime committed, if the first wife was dead or divorced. Inasmuch as the State was required to prove the appellant's guilt beyond a reasonable doubt, we think the jury were not justified in coming to the conclusion, over the presumption of his innocence, that the first wife was living at the time of the second marriage.

We think the admissions of the appellant were sufficient to establish the first marriage, and that it was legal.

We think the court committed no error in admitting in evidence the marriage license issued by the clerk of Daviess county, and the return made thereon by the clergyman who performed the marriage ceremony.

It is earnestly insisted by counsel for appellant, that the evidence failed to prove that the second marriage took place in Daviess county, but as the judgment will have to be reversed, the State can supply any omission as to the record upon another trial, and we therefore express no opinion on the point made.

For the failure of the State to prove that the first wife was living at the time of the second marriage, the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion; and the clerk will direct the warden of the southern prison to remove the prisoner to the jail of Daviess county.

Moore v. Kerr et al.

MOORE v. KERR ET AL.

PLEADING.—*Partition of Real Estate.*—*Answer.*—Complain: for the partition of real estate. Answer, that the plaintiffs and the defendant, being of full age, entered into a parol contract by which each selected a disinterested person to make partition of the land; that the persons so selected made partition, and the parties then had the land which was set off to each surveyed and the lines established; that each then took possession of the respective parts so set off, and had the same transferred on the tax duplicate, and had so held possession for eight years; and that the defendant had made lasting and valuable improvements on the part set off to him; and asking that a commissioner be appointed to make deeds, etc., and that the defendant's title be quieted.

Held, that this was a good answer in bar.

SAME.—It was not necessary that the answer should allege an offer of the defendant to make a deed to the plaintiffs, or show a demand upon the plaintiffs for a deed.

PARTITION.—*Tenants in Common.*—*Partition by Parol.*—A parol partition made by tenants in common is valid, where possession is taken and held in pursuance of such partition.

PRESUMPTION OF LAW.—*Plaintiff Suing by Guardian.*—Where a complaint shows that one of the plaintiffs sues by a guardian, and the answer alleges that eight years prior to the filing of the complaint, the plaintiffs, being of full age and competent to contract, made a contract, etc., the court will not presume, on demurrer to the answer, that the plaintiff suing by guardian was insane or an infant at the time of making the contract set up in answer.

From the Henry Circuit Court.

M. E. Forkner and E. H. Bundy, for appellant.

J. Brown and R. L. Polk, for appellees.

DOWNEY, J.—This was a petition by Abigail Kerr, by her guardian, John S. Moore, and by William Hobson, plaintiffs, against Philip Moore, for the partition of certain real estate, of which it is alleged the parties are tenants in common in the proportions following: said Abigail one-third, said William Hobson two-sevenths of two-thirds, and said Philip Moore five-sevenths of two-thirds, filed September 13th, 1872. Moore, the appellant, filed an answer and cross complaint, alleging that the plaintiffs ought not to maintain their action, because heretofore, to wit, in the year 1864, the plaintiffs and defendant, being the owners of said land and being all of full age and competent to contract, entered into

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a contract, whereby they agreed to choose each a disinterested person to make partition of said lands between them; that in pursuance of said contract, the said Kerr chose Jacob Clapper, this defendant chose Cheniah Covalt, and said Hobson chose Joseph Koons, who were all disinterested parties, to make said partition; that thereupon said parties so chosen made partition of said land between said Kerr, Hobson, and this defendant, and assigned and set off to said William Hobson twenty-one acres off the north end, etc., to Abigail Kerr twenty-nine acres of said tract immediately south of, etc., and to this defendant all the balance of said land, and the parties procured the county surveyor to survey and establish the lines of the land so set off to each; that in pursuance of the said contract and partition so made under it as aforesaid, each of the parties above named entered into and took possession of the lands respectively set off and assigned to them, and procured the same to be transferred to them respectively upon the tax duplicate of the county and duly entered for taxation, and have held possession solely and uninterruptedly of said real estate so assigned to them from that day to the present time. It is further alleged that the defendant has made lasting and valuable improvements on the land so assigned to him, has expended two hundred dollars in ditching said land, has built fences upon the same to the value of one hundred dollars, and otherwise improved the same and placed it in a high state of cultivation. Prayer for confirmation of said partition, that a commissioner be appointed to execute to each of the parties a deed for the land set off to him, and that the title of the defendant be quieted, etc.

The plaintiffs demurred to this paragraph of the answer on the ground that it did not state facts sufficient, etc., and the demurrer was sustained. Upon an additional answer partition was decreed, and an amount allowed to the defendant, in land, for the improvements which he had made.

The ruling of the court in sustaining the demurrer to the first named paragraph of the answer is the error assigned.

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As the contract or agreement, under and in pursuance of which the partition was made, is not alleged to have been in writing, we must presume that it was oral. The question presented then is this: is a parol partition, made by tenants in common, where possession is taken and held in pursuance of such partition, valid? The decisions of courts upon the question are not uniform. In some of the states, such partitions are held invalid, as being against the statute of frauds, while in others they are held not liable to that objection. In this State, so far as we know, the question is an open one. In the case under consideration, according to the answer in question, the division was made by persons chosen by the parties, a survey was made accordingly, the part set off to each was transferred to him for taxation, each party took possession of his allotted share, had held the same severally and exclusively for eight years before this suit was brought, and the defendant had made valuable and lasting improvements on the portion set off and assigned to him. We have examined the authorities to which counsel have referred us, and such others as we could conveniently find, and have come to the conclusion that the partition in question is valid. The distinction between the partition of lands among the owners thereof and a sale of lands is pretty clear. The statute of frauds relates to "contracts for the sale of lands." After partition of land has been made among tenants in common, each owns in severalty an interest equal to that which before he held in common. The partition does not transfer the title of the parties so much as it assigns or apportions to each his share in severalty in the land. But however this may be, we are disposed to follow the authorities which hold such partitions valid. *Wood v. Fleet*, 36 N. Y. 499; 1 Washburn Real Prop. 587, par. 13, 3d ed.

Counsel for appellees contend that we should infer from the answer, it not being stated that Abigail Kerr was an insane person, that she was an infant when this action was brought, and consequently must have been an infant when the alleged partition was made. We can not indulge this presumption,

for the reason that it is averred in the answer, as we have seen, that at the time of the alleged contract and partition, the parties were "all of full age and competent to contract." We rather infer that the condition of the said Abigail Kerr, which made it proper or necessary that she should have a guardian, occurred after the making of the said partition and before the bringing of the action. We can not infer that she was under guardianship at the time the contract and partition were made.

It is also urged that the answer is bad, for the reason that it does not allege an offer on the part of the defendant to make a deed to the plaintiffs, nor a demand upon them for a deed. If we are right in holding that the partition was valid under the circumstances disclosed, it was not necessary that the defendant should have demanded a deed. He could defend upon the partition without a deed. He asks and may be entitled to a deed as a means of quieting his title. If the court shall decree a deed to him, it may at the same time decree a deed from him to the plaintiffs.

Again, it is contended that the answer is pleaded in bar of the action, and that it is no bar; that it amounts to no more than saying "true partition ought to be made, and I want partition, but I want a different one from that asked in the complaint." It seems to us that if the answer shows a valid partition of the land already made, by which the parties are all bound, it is a bar to the action. When there has been one valid partition of land, that may be pleaded in bar of another partition.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the answer or cross complaint, and for further proceedings.

Sharkey *et al.* v. Evans, Adm'r.

SHARKEY ET AL. *v.* EVANS, ADMINISTRATOR.

EVIDENCE.—*Trespass.*—*Pleadings in Former Action.*—*Entry of Clerk.*—In an action for trespass upon the real estate of the plaintiff, the pleadings, entries, and judgment in a former action of the plaintiff against one of the defendants, to recover possession of the real estate, where the judgment was for the defendant, but the entry of judgment contained a statement that the ground upon which the judgment was rendered was, that the defendant was the tenant of the plaintiff and had received no notice to quit, were inadmissible as evidence for the plaintiff to show that he was the owner of the real estate.

RECORD.—*Former Action.*—*Issue in Former Action, how Determined.*—What was in issue in a former action must be determined from the pleadings; and when the issues were tried by the court, in the absence of a special finding by the court, a mere statement in the entry made by the clerk can not be regarded as showing on what particular ground the finding and judgment proceeded.

From the Henry Circuit Court.

J. T. Elliott and M. L. Bundy, for appellants.

J. Brown and R. L. Polk, for appellee.

DOWNEY, J.—This was an action by John Myers, the intestate of the appellee, against the appellants, twelve in number. It is alleged in the complaint, that on the 12th day of March, 1871, at, etc., the defendants, with force and arms, did, then and there, unlawfully and wrongfully enter upon the premises of the plaintiff, situate, etc., and did then and there remove, injure, and destroy one dwelling-house belonging to the plaintiff, of the value of three hundred dollars, and did then and there remove, injure, and destroy one smoke-house and out-house belonging to the plaintiff, of the value of seventy-five dollars, and break down, injure, and destroy the fence around the said house, of the value of ten dollars, to the damage of the plaintiff four hundred dollars, for which sum he demands judgment.

The defendants answered in four paragraphs: 1. A general denial. 2. That they were the servants and employees of the Columbus, Chicago, and Indiana Central Railway Company, a lawful corporation created under the laws of the State of Indiana; that the said railroad company, by the leave,

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license, and express permission of the owner of the close, soil, and freehold, in the year 1863, erected thereon the house and structure in the complaint mentioned, and ever thereafter said railroad company continued to possess and occupy the same for their own use, all of which was well known to the plaintiff; that afterward, the owner conveyed the said close to the plaintiff, who demanded ground rent, which the railroad company paid him, and continued to retain and occupy the peaceable possession thereof, up to the time in the complaint mentioned, when, by direction of said company, these defendants, her servants and employees aforesaid, removed said house on the land of said company near by, as they lawfully might for the cause aforesaid, doing no unnecessary injury to said plaintiff; and these are the same trespasses whereof the plaintiff has complained against them.

3. That the house in the complaint mentioned, at the time therein stated, was moved by the leave and license of said plaintiff. 4. That the defendants are the servants and employees of the said railroad company; that in 1861 the said house was built by said company under the supervision of one Robert Mink, the road master of said company, and occupied by Michael Butler, section boss; that the lot on which it was built was bought and paid for by said company, but Butler took the deed in his own name without the knowledge of said company; that the house was built, owned, and occupied by said company, and has always been in its possession and occupied by its agents and servants for the use of the company; that said plaintiff Myers, at the time of his purchase, well knew that said premises had always been in the adverse possession of the railroad company, under a claim of title thereto, and well knew that the company had built the house on said lot and claimed the ownership thereof; and these facts the said defendants are ready to verify, etc.

Reply to the second, third, and fourth paragraphs of the answer by a general denial, trial by a jury, verdict for the plaintiff, except as to Patrick Garret, who was found not guilty. The defendants against whom the verdict was

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found moved the court for a new trial, for the reasons following, viz.: 1. The verdict is not sustained by sufficient evidence and is contrary to law. 2. Permitting the plaintiff to give in evidence the judgment and proceedings in this court in the case of the plaintiff herein against said Thomas Sharkey, one of said defendants, at the March term, 1871. 3. In giving instructions one, two, three, and four, and each of them, on its own motion. 4. Refusing to give instructions one, two, three, four, five, six, and seven, asked by the defendants.

This motion was overruled, and final judgment rendered on the verdict. The error assigned is the overruling of the motion for a new trial.

Passing over the first reason for a new trial, we will examine the second reason.

The pleadings and entries admitted in evidence were in a former action by Myers against Sharkey, to recover the possession of the ground and house in question. The plaintiff offered and read in evidence the complaint, the answer, which was a general denial, and the judgment. The object of the plaintiff in offering the papers and judgment was, apparently, to show by them that, in that action, he was found to be the owner of the property, and that he failed to recover only on the ground that the defendant was his tenant, and had received no notice to quit. The judgment was a judgment for the defendant. The statement of the ground on which it was rendered must be regarded as the act of the clerk in making his entry. There was no proper special finding by the judge given in evidence or set out in the judgment, nor was it in any way legally shown on what ground the judgment proceeded. In our opinion, the judgment was no evidence of the ownership of the property by the plaintiff or of the fact that the defendant Sharkey was his tenant. Hence we conclude that, for the purpose intended, the judgment was not legal evidence, and should not have been admitted. Except for the statement in the entry of the judgment, made by the clerk, of the ground on which the case was decided, there is nothing in the record tending to sup-

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port the plaintiff's case. On the contrary, the judgment having been for the defendant Sharkey, the record would seem to have been against the plaintiff rather than for him.

In referring to this evidence, the court, in its charge to the jury, said :

"The record of the finding of the court, in a case heretofore tried between the plaintiff and the defendant Sharkey, is only to be considered by you as evidence tending to prove title to property in the plaintiff as against said Sharkey, but it is not evidence against any of the other defendants. As they were not parties to that suit, they are not bound by such finding in any manner, and said finding is not conclusive against said Sharkey."

As we have already said, we can not regard the entry of the judgment in the former action as showing, in any legal way, the ground on which that judgment was rendered. We have often decided that a finding, unless made by request of the parties, or one of them, and signed by the judge, or, when the case comes to this court, contained in a bill of exceptions, can not be regarded as a special finding, but only as a general finding. When we seek to find what was in issue in a former action, we must look to the pleadings, and when the issues have been tried by the court, as was the case here, we can not regard the mere statements in the entry made by the clerk as showing on what particular ground the finding and judgment proceeded.

Some other questions are presented, relating to other instructions, but, as the facts may be different on another trial, we need not consider them.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

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SINTON, ET AL. v. THE STEAMBOAT R. R. ROBERTS, ALIAS NEW ERA.

PRACTICE.—Demurrer.—Plea in Abatement.—If an objection to a complaint on account of an error in the name of the defendant can be raised by demurrer, it can only be done by assigning as a cause of demurrer a defect of parties defendants. But the proper remedy is by a plea in abatement.

CLERICAL MISTAKE.—A mere clerical mistake, being amendable in the court below, will, in the Supreme Court, be regarded as amended.

JURISDICTION.—Courts of the United States.—Admiralty.—The admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel, for work done and materials furnished in its construction.

SAME.—State Courts.—The courts of this State possess full and ample jurisdiction of a cause of action resting upon a debt arising out of the building of a steamboat in Indiana, under a contract made in Indiana.

ATTACHMENT.—Lien upon Steamboat.—Surrender of Note.—In a proceeding by attachment, to enforce a lien against a steamboat, under the statute of this State, for the price of an engine and boiler used in its construction, it is not necessary that the complaint should contain an offer to surrender a note given for the same.

SAME.—The taking of such note does not destroy the lien.

SAME.—Nor does the assignment of such note destroy the lien. The assignment carries with it the lien.

SAME.—Delay in Enforcing Lien.—Where a debt has been incurred in building a steamboat, and the boat has left the State and been absent about nine years, the lien in such case is not lost by delay. A lien in such case is not lost unless there has been unreasonable neglect and delay, operating to the prejudice of third parties, after opportunities have existed to enforce the lien.

SAME.—Pleading.—If a complaint to enforce such lien does not show that there has been unreasonable delay, if such fact exist, it must be shown by answer.

SAME.—Notice of Lien.—Registry Laws.—Such lien may be enforced though no notice of the lien has been given as required by the registry laws of the United States.

SAME.—Lien Created by Master.—The statute of this State provides a lien for liabilities created by the master of a steamboat.

From the Floyd Circuit Court.

M. C. Kerr and W. C. Hisey, for appellants.

BUSKIRK, J.—This case has been in this court before. It is reported in 34 Ind. 448. It is a proceeding by attachment to enforce a lien under the statute of the State against a steamboat, for the price of the engine and boilers. Those

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who desire a more specific statement of the facts are referred to the former opinion of this court.

When this case was formerly here, the judgment was reversed, because the court below had improperly sustained a motion to quash the attachment. When the cause was remanded, a demurrer was sustained to the complaint, but upon what grounds, or for what reasons, we are not advised, except that the ground of the demurrer was a deficiency of facts to constitute a cause of action. The record in a cause informs us what the ruling of the court below was upon any given point, but it seldom informs us what were the grounds of the ruling, or what reason controlled the action of the court below. For this information, we usually look to the brief of counsel who procured the ruling to be made. When this cause was here before, we were not aided by a brief for appellee, but we had to look to the brief of counsel for appellant to ascertain the supposed ground upon which the ruling was based. We are again in the same condition. There is no brief for the appellee. We are informed by the brief of counsel for appellants, that eleven objections were urged in the court below to the complaint, but we do not know which one or how many of the objections were sustained by the court. A brief from counsel for appellee would, at least, inform us what objections were relied upon, and what were waived, and thus our labors would be lightened, and we would be aided by the argument of counsel in arriving at a just and correct conclusion. But as it is, we will have to consider the questions discussed by counsel for appellants, unaided by an argument in support of the ruling of the court below or citation of authorities. We do not intend by what we have said to censure the learned counsel who appeared for the appellee in the court below, as there may be a sufficient reason why he has not briefed the case; but the failure of counsel to brief their causes has become so frequent as to make it our duty to call the attention of the profession of the State to the subject, in the earnest hope that it may lessen a great and growing evil. The failure of counsel for an

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appellee to brief a case frequently results in injury to his client and injustice to the court below, and always increases our labors, and sometimes causes an incorrect decision here. An attorney who, by argument and production of authorities, induces a court to render a ruling in his favor, owes it to that court, to his client, and his own reputation, that when the cause is appealed here, he should aid us by argument and citation of authorities. If this is true of counsel for appellees, what excuse can be offered for an attorney who appeals a cause to this court, and obtains a *supersedeas*, and then fails to properly brief the cause! We felt it to be our duty in *Kesler v. Myers*, 41 Ind. 543, to point out some of the evils which resulted from a failure on the part of counsel to properly brief and look after their causes in this court. These suggestions are not made in a captious or censorious spirit, but from a sincere desire to induce our brethren to aid us in the discharge of our difficult and arduous duties.

We proceed to the examination of the questions discussed by counsel for appellants.

It is objected that the complaint is defective, because there is an error in the name of the defendant, the boat being called in the body of the complaint the "R. R. Roberts, *alias* the New Era," and in the note the "T. W. Roberts." This objection was considered in the former decision of this case, and was held to be untenable. If the objection could be raised by demurrer, it could only be by assigning for cause of demurrer a defect of parties defendants. This was not done. The proper remedy would have been a plea in abatement. *Mann v. Carley*, and *Chapin v. Carley*, 4 Cowen, 148; *Miller v. Stettiner*, 7 Bosworth, 692; *Miller v. Stettiner*, 22 How. Pr. 518.

Viewing the entire complaint and exhibits together, it is very manifest that it is a mere clerical mistake, and, being amendable in the court below, will be regarded as amended. *Bauman v. Grubbs*, 26 Ind. 419.

The jurisdiction of the court is again called in question. It was expressly held, when this case was here before, that

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the court below possessed jurisdiction of the subject-matter of the action. We suppose that counsel for appellee rely upon the late decisions in admiralty cases, reported in 4 Wallace, pp. 411, 555. But those and like authorities only decide that the jurisdiction of the United States courts over causes cognizable in admiralty is exclusive. They have no relation whatever to the vast amount of business and litigation not cognizable in admiralty. The cause of action in the present case belongs to the latter class. The action rests upon a debt arising out of the building of a steamboat, in Indiana, under a contract made in Indiana, and now sought to be enforced in the tribunals of the State.

It is well settled, that the admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel, for work done and materials furnished in its construction. *The People's Ferry Co., etc., v. Beers*, 20 How. U. S. 393; *Roach v. Chapman*, 22 How. U. S. 129; *Steamboat Orleans v. Phœbus*, 11 Pet. 175; *The Belfast*, 7 Wal. 624; *Amy v. The Supervisors*, 11 Wal. 136; *Leon v. Galceran*, 11 Wal. 185; *Wyatt v. Stuckley*, 29 Ind. 279; *Sinton v. The Steamboat R. R. Roberts*, 34 Ind. 448; 2 Parsons Shipping & Admiralty, 328.

In *The Belfast, supra*, the court say: "Authority does not exist in the state courts to hear and determine a suit *in rem* in admiralty to enforce a maritime lien. Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode for their enforcement."

But it may be claimed that the statute of this State which gives a lien on boats and other water craft may be a regulation of commerce, and therefore void under the ruling in the above case. Upon this point, the following language is

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used in such case: "Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants.

"Congress may regulate commerce with foreign nations and among the several States, but the judicial power, which, among other things, extends to all cases of admiralty and maritime jurisdiction, was conferred upon the Federal Government by the Constitution, and Congress cannot enlarge it, not even to suit the wants of commerce, nor for the more convenient execution of its commercial regulations."

There seems to be a misconception as to the scope and effect of the decisions of the Supreme Court of the United States, reported in 4 Wallace, and known as the Admiralty Cases.

The Moses Taylor, 4 Wallace, 411, was an action brought under a statute of California, in a court of that State, against the steamship Moses Taylor, for a breach of a contract made by Roberts, the owner of the vessel, with one Hammons, to transport him from New York to San Francisco. The defendant appeared to the action, and pleaded to the jurisdiction of the court. The plea was overruled, and the state courts assumed and exercised jurisdiction, and rendered judgment against the defendant, from which he appealed to the Supreme Court of the United States, where it was held the contract was a maritime contract, and alone cognizable in the admiralty courts. The court say: "The case presented is clearly one within the admiralty and maritime jurisdiction of the Federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a

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contract for the transportation of merchandise. The same liability attaches upon their execution, both to the owner and the ship. The passage-money in the one case is equivalent to the freight-money in the other. A breach of either contract is the appropriate subject of admiralty jurisdiction."

The court further held, that under the Federal Constitution and the legislation of Congress, the jurisdiction of the Federal courts in such cases was exclusive.

The case of *The Hine v. Trevor*, 4 Wallace, 555, was a case of collision between two steamboats on the Mississippi river, at or near St. Louis. Some months afterward, the owners of the Sunshine caused the Hine to be seized while she was lying at Davenport, Iowa, in a proceeding under the laws of that State, to subject her to sale in satisfaction of the damages sustained by their vessel. The code of Iowa, under which this seizure was made, gives a lien against any boat found in the waters of that State, for injury to person or property by said boat, officers, or crew, etc.; gives precedence in liens; authorizes the seizure and sale of the boat, without any process against the wrongdoer, whether owner or master, and saves the plaintiff all his common law rights, but makes no provision to protect the owner of the vessel.

The owners of the Hine interposed a plea to the jurisdiction of the state court. The point being ruled against them, it was carried to the Supreme Court of that state, where the judgment of the lower court was affirmed, from which judgment an appeal was taken to the Supreme Court of the United States. It is apparent that the sole question presented for decision was, whether the state courts of the State of Iowa possessed jurisdiction to hear and determine the liability of the defendants for the injuries resulting from a collision between two steamboats on the Mississippi river.

It was held by the Supreme Court of the United States, in *The Thomas Jefferson*, 10 Wheat. 428, that the jurisdiction of the courts of admiralty in the United States was lim-

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ited to the ebb and flow of the tide ; and this continued to be the recognized doctrine until 1851. The ruling was made under the judiciary act of the 24th of September, 1789, and followed the rule as it existed in England.

It was on the 26th of February, 1845, enacted by Congress, "that the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steam-boats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the same time employed in business of commerce and navigation, between ports and places in different states and territories, upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels, employed in navigation and commerce upon the high seas, or tide-waters within the admiralty and maritime jurisdiction of the United States."

In the case of *The Propeller Genesee Chief v. Fitzhugh*, 12 How. U. S. 443, the constitutionality of the above act was called in question. It was contended, that as the admiralty and maritime jurisdiction, as known and understood in England and in this country at the time the constitution was adopted, was confined to the ebb and flow of the tide, and that as there was no tide in the lakes, or the waters connecting them, Congress possessed no power to enact the above quoted act. The court say: "Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason ; and, indeed, would seem to be inconsistent with it. In England, undoubtedly, the writers upon the subject, and the decisions in its courts of admiralty, always speak of

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the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter and depart with cargoes. In England, therefore, tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.

"At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen states the far greater part of the navigable waters are tide-waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide-water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide-water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England."

The court held the act of 1845 to be constitutional and valid. But two things should be observed in reference to

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the act of 1845 and the above decision, and they are : First, the subjects of admiralty and maritime jurisdiction were not enlarged. The effect of such act was to extend to such courts the same jurisdiction over the lakes and waters connecting them, as was then possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide-waters within the admiralty and maritime jurisdiction of the United States. Second, that such jurisdiction was not held to be exclusively in the courts of the United States. The result was, that this jurisdiction was exercised concurrently between the federal and state courts. Mr. Justice MILLER, in delivering the opinion in the case of *The Hine v. Trevor*, *supra*, in speaking of the ruling in the case of *The Propeller Genesee Chief v. Fitzhugh*, *supra*, says: "That decision was made ten years ago, and the jurisdiction, thus fairly established, has been largely administered by all the district courts of the United States ever since, without question.

"At the same time, the state courts have been in the habit of adjudicating causes, which, in the nature of their subject-matter, are identical in every sense with causes which are acknowledged to be of admiralty and maritime cognizance ; and they have in these causes administered remedies which differ in no essential respect from the remedies which have heretofore been considered peculiar to admiralty courts. This authority has been exercised under state statutes, and not under any claim of a general common law power in these courts to such a jurisdiction."

The conclusions reached in the above case are stated thus :

"It must be taken, therefore, as the settled law of this court, that wherever the district courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law.

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"This examination of the case, already decided by this court, establishes clearly the following propositions:

"1. The admiralty jurisdiction, to which the power of the federal judiciary is by the constitution declared to extend, is not limited to tide-water, but covers the entire navigable waters of the United States.

"2. The original jurisdiction in admiralty exercised by the district courts, by virtue of the act of 1789, is exclusive, not only of other federal courts, but of the state courts also.

"3. The jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the act of September 24th, 1789.

"4. The admiralty jurisdiction exercised by the same courts, on the lakes and the waters connecting those lakes, is governed by the act of February 26th, 1845."

It is plain and obvious that the foregoing decisions have not taken away from the state courts the power to enforce such remedies, in cases not cognizable in the admiralty courts, as have been provided by the state legislatures, and we have seen by the rulings in the cases hereinbefore cited, that the cause of action in the present case never has been cognizable in the admiralty courts. Prior to such decisions, the jurisdiction in cases conferred by the two acts of Congress had been exercised concurrently by the federal and state courts, but since such decisions the jurisdiction has been exercised exclusively by the admiralty courts to the exclusion of the other federal and state courts.

The cause of action which is the foundation of the present action, not being cognizable in the admiralty courts, and the remedy being provided by the legislature of this State, the court below possessed full and ample jurisdiction of the cause.

The third objection to the complaint is, that the averment of a demand is not sufficient; and the fourth is, that there is no specific averment that the claim is due. Both of these objections were considered when this case was here before,

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and were decided adversely to the appellee. We adhere to such ruling, and will not further consider such objections.

It is further urged that the complaint is defective, because it does not offer specifically to surrender the note. The objection is untenable. This is a proceeding under the code of this State to enforce a lien given by the statute of this State, and all that is required is, that the note or a copy shall be filed with and made a part of the complaint. The original must be produced on the trial, unless lost or some valid excuse be shown. The note becomes a part of the files in the cause. But if this were a proceeding in admiralty, no formal tender is necessary either in the pleadings or on the trial. *Meyer v. Tupper*, 1 Black, 522; *Carter v. Townsend*, 1 Clifford, 1; *The Brig Nestor*, 1 Sumner, 73; *The Salem's Cargo*, 1 Sprague, 389; *Raymond v. The Schooner Ellen Stewart*, 5 McLean, 266; *Steamboat Charlotte v. Lumm*, 9 Mo. 64; *Merrick v. Avery*, 14 Arkansas, 370.

It is next contended that the lien of the plaintiff was lost by taking the note sued on. We do not think so. The statute gives a lien to secure the debt. The note is not the debt, but is the mere evidence of the debt. The giving of a note by the debtor does not waive a vendor's or mechanic's lien. We can see no reason why it should in this case. See the cases cited under the fifth objection.

It is also insisted that the lien was lost by the assignment of the note. So much of section 655 as relates to the present case is as follows:

"Sec. 655. All boats, vessels, and water crafts of every description, found in the waters of this State are liable: First. For all debts contracted by the master, owner, agent, clerk or consignee thereof, on account of supplies furnished for the use of the same, on account of work done or services rendered for the same,—by boatmen or mariners, or any other persons, or on account of work done or materials furnished in building, repairing, fitting out, furnishing or equipping such boat, vessel or water craft."

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The note sued on is made assignable by our statute. See an act concerning promissory notes, etc., 2 G. & H. 658. The assignment of the note transfers the lien given by the statute, the same as the assignment of a note transfers the mortgage, or vendor's or mechanic's lien.

It is due to the profession of the State, that we should state that we express no opinion as to the constitutionality and validity of the second and third clauses of section 655. They are not involved in the present action. They are, however, very similar to the statute of California, which was held void in *The Moses Taylor, supra*, and to the statute of Iowa, that was held void in *The Hine v. Trevor, supra*. The above statutes were held void because they embraced matters that were cognizable only in the admiralty courts.

It is further claimed that the lien of the plaintiff has been lost by the lapse of time. It is averred in the complaint that the boat was built in 1860, at New Albany, Indiana, and that thereafter it has never been within the jurisdiction of the State until the fall of 1869, when this action was commenced, without delay, to assert the lien. As to the effect of the lapse of time, see *The Barque Chusan*, 2 Story, 455, and *The Prospect*, 3 Blatchford C. C. 526. In the last case, the court say:

"In order to make out a case that will have the effect to avoid a lien, from delay in enforcing it against a vessel, there must be something more than mere lapse of time—unless, indeed, the delay be such that the court, in analogy to the statute of limitations, would hold the debt to be barred—there must be unreasonable neglect and delay, operating to the prejudice of third persons, after opportunities have existed to enforce the lien."

There is nothing in the complaint to show unreasonable delay. If such facts exist, they should be affirmatively shown in an answer.

It is further suggested that, because the boat was permitted to leave the State, the lien was lost. There is nothing in the complaint showing any culpable negligence.

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If such a defence could be made, it does not arise upon the complaint.

It is also contended that the action can not be maintained, because no notice of the lien was given as required by the registry laws of the United States. It is sufficient to say that this is not a proceeding in admiralty under the laws of Congress, but is a proceeding under our statute, which does not require any notice of the lien.

Finally, it is contended that Roberts, as master of the boat, possessed no power to execute the note sued on, and thereby create a lien on the boat. The lien was created by the original contract. The giving of the note did not waive or discharge the lien. The statute, upon which this proceeding is based, in express terms, provides for liabilities created by the master of the boat. The master executed the note for himself and other owners of the boat.

In our opinion, the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

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PLEADING.—Demurrer.—A demurrer for want of sufficient facts will be overruled, if on the facts stated the plaintiff is entitled to any relief whatever, although not entitled to that demanded.

SAME.—Trespass.—Injunction.—A complaint alleging the commission of a trespass upon real estate, by cutting and carrying away timber, and alleging that an additional trespass is threatened and apprehended, and asking an injunction, is good on demurrer.

STATUTE OF FRAUDS.—Sale of Growing Trees.—A contract for the sale of growing trees is a contract for the sale of an interest in land, and must be in writing, in order to render it binding on either party.

46	488
182	474
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LICENSE.—*Trespass.*—A parol license to enter on lands will excuse what would otherwise be a trespass.

SAME.—A license confers only a privilege, and does not pass an estate, and may be revoked or countermanded at any time by the licensor.

SAME.—*Parol Agreement for Sale of Growing Trees.*—A parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee, will amount to a license for the vendee to enter upon the vendor's land for the purpose of making such severance; and if the license is not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license after such severance will become coupled with an interest and irrevocable, and the vendee will have a right to enter and remove the trees thus severed; but if, before the trees are severed, the vendor should revoke such license, no title will pass to the vendee, and no rights will vest by virtue of such parol agreement.

GROWING TREES.—Growing trees are a part of the real estate, and are in the possession of the owner of the real estate until they are severed, and no delivery of the trees to another can take place, short of transferring an interest in the real estate.

From the Wayne Common Pleas.

T. J. Study, for appellant.

H. C. Fox and L. D. Stubbs, for appellee.

BUSKIRK, J.—The assignments of error call in question the sufficiency of the complaint, to which a demurrer was overruled, and the sufficiency of the answer, to which a demurrer was sustained.

The complaint, omitting the formal parts, was as follows:

"The said plaintiff, Allen W. Lewis, complains of the said defendant, Benjamin A. Owens, and says that said defendant, on the 9th day of July, 1872, in person and by his servants and agents, entered upon the lands of the said plaintiff, situate in said county; to wit, the south-east quarter of section 32, township 18, range 14 east, and with strong hand and force of arms, without the authority and consent of said plaintiff, and commenced cutting and destroying the timber of said plaintiff, situate on said lands, and has cut and destroyed divers trees on said lands, the property of said plaintiff; that the said defendant, in person and by his servants and agents, without leave as aforesaid, wrongfully and unlawfully entered upon said land of said plaintiff and cut timber

Owens v. Lewis.

If such a defence could be made, it does not arise upon the complaint.

It is also contended that the action can not be maintained, because no notice of the lien was given as required by the registry laws of the United States. It is sufficient to say that this is not a proceeding in admiralty under the laws of Congress, but is a proceeding under our statute, which does not require any notice of the lien.

Finally, it is contended that Roberts, as master of the boat, possessed no power to execute the note sued on, and thereby create a lien on the boat. The lien was created by the original contract. The giving of the note did not waive or discharge the lien. The statute, upon which this proceeding is based, in express terms, provides for liabilities created by the master of the boat. The master executed the note for himself and other owners of the boat.

In our opinion, the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

OWENS v. LEWIS.

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thereon of the value of one hundred dollars, and carried part thereof away, to his damage of one hundred dollars. And the plaintiff further says, that said defendant declares, threatens, and says, that he intends to continue cutting and hauling away timber off and from said land until he shall have taken one hundred valuable trees therefrom; and the plaintiff shows that there is not time to give said defendant notice of their application for a restraining order or temporary injunction, without endangering the loss of other and valuable timber belonging to him; hence he says an emergency exists, as he verily believes, for a temporary restraining order; wherefore plaintiff prays the said defendant, and all others acting under him, may be temporarily restrained from cutting timber or trees from said land, or entering upon the same; and, upon a final hearing, he asks a judgment of two hundred dollars, and that defendant and all others acting under him be perpetually enjoined from entering upon said lands and cutting and taking timber therefrom, and grant him such other relief as may be just."

The principal objection urged to the complaint is, that its purpose is to enjoin the commission of a mere trespass upon land, and that this does not constitute a sufficient ground for injunctive relief. We think the counsel for appellant has misconceived the scope and purpose of the complaint.

The complaint in this action charged the defendant with wrongfully and unlawfully entering upon, and cutting, destroying, and carrying away timber from, the lands of the plaintiff, of the value of one hundred dollars. This was a cause of action and entitled the plaintiff to relief by way of damage, which was prayed for. It was expressly alleged, that the defendant unlawfully broke and entered the plaintiff's close. This was the gist of the action. The cutting and carrying away timber after entry was a matter in aggravation, going to the measure of damages. *Rucker v. M'Neely*, 4 Blackf. 179; *Green v. Boody*, 21 Ind. 10; *Holcraft v. King*, 25 Ind. 352; *Taylor v. Cole*, 3 Term Rep. 292; 1 Smith Lead. Cases, 249.

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It was the unlawful entry upon the plaintiff's land that the defendant was called upon to explain; *quare clausum fregit*. The facts constituting an unlawful entry were sufficiently alleged, and this was a cause of action. In addition to this, it was charged, that the defendant "threatened to continue cutting and hauling away timber off and from said land," and to prevent this an injunction was asked. The commission of a complete trespass was alleged and damages therefor demanded; an additional trespass was apprehended and threatened, and this the court was asked to prevent. It certainly requires no argument to prove that the demurrer to the complaint, for the reason that the same did not "state facts sufficient to constitute a cause of action," should be overruled; for a "cause of action" is unquestionably shown by the facts alleged. This being true, the court committed no error in the ruling made, and the question argued by counsel, as to whether an injunction will be granted to prevent the commission of a trespass, is not presented; for a trespass already committed was alleged as a cause of action, and this made the complaint good on demurrer.

A demurrer for want of sufficient facts will be overruled, if on the facts stated the plaintiff is entitled to any relief whatever, although not to that demanded. *Bennett v. Preston*, 17 Ind. 291.

We think the court committed no error in overruling the demurrer to the complaint.

After the demurrer to the complaint was overruled, the appellant filed an answer in one paragraph in bar of the action. To this a demurrer was filed and sustained, and this ruling is assigned for error, and presents for our decision the principal, and by far the most important, question in the case. The answer was as follows:

"The defendant, for answer to the complaint, says that, heretofore, to wit, on the 25th day of June, 1872, the said plaintiff was then the owner of a large number of walnut trees, then standing and growing upon the lands of the plaintiff, mentioned and described in the complaint, and the

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defendant was then desirous of purchasing of plaintiff one hundred and six of said trees, and the latter then offered to sell said number of said trees to the defendant, at and for the sum of two thousand dollars, which offer and proposition of plaintiff the defendant then and there accepted; and that the plaintiff and defendant then went to the plaintiff's lands, where said trees were situate, and the defendant then selected, measured, and counted one hundred and six of said trees, and which number of said trees so selected, measured, and counted by the defendant the plaintiff then and there sold and delivered to the defendant, at and for the sum of two thousand dollars, and which number of said trees the defendant then and there accepted of the plaintiff at said sum, which, according to said agreement of said parties thereto, was to be paid as follows, to wit: one thousand dollars inside of three weeks from the time of sale, and the balance thereof before all of said trees were cut and removed from the plaintiff's land, which was to be done in the course of one or two months from the time of sale; and the defendant says that before the expiration of three weeks from said sale, the defendant tendered the plaintiff the whole of said two thousand dollars, which the plaintiff refused to accept. And the defendant says that afterward, to wit, on the 9th day of July, 1872, he did enter upon the lands of plaintiff mentioned and described in the complaint, and commenced cutting and removing said trees from the said lands of the plaintiff, in pursuance of the terms of said contract between plaintiff and defendant for the sale of said trees as above stated; and defendant says that about the time he commenced to cut and remove said trees, as above stated, the plaintiff gave him notice not to cut or remove said trees from his said lands, which notice of the plaintiff the defendant disregarded, and proceeded to, and commenced to cut and remove said trees, and those only that he had purchased of plaintiff; whereupon, the plaintiff commenced this suit. And the defendant says that the above entry upon said lands of plaintiff, and the cutting of timber thereon

as above stated, constituted the alleged trespass in the complaint stated."

Counsel for appellant contends that the owner of standing trees, growing upon his own soil, may make a valid sale of the same by verbal contract, and that such contract is not in any manner affected by that provision of the statute of frauds governing the manner in which real estate or any interest therein shall be sold, especially when such sale contemplates the immediate separation and severance of such trees from the soil and a removal therefrom. Such a transaction is evidently and substantially a sale of personal property only.

Counsel for appellee assume the following legal propositions:

1. A contract for the sale of growing trees is a contract for the sale of an interest in land, and must be reduced to writing, in order to render it binding upon either party.

2. If such contract is not reduced to writing, it is not invalid, yet it cannot be enforced, for the reason that it cannot be proven under the statute of frauds.

3. A parol contract for the sale of growing trees, though it cannot be enforced, will justify the vendee in entering upon the lands of the vendor for the purpose of severing such trees from the land. It will amount to a license so to do.

4. Although a parol contract for the sale of growing trees will amount to a license for the vendee to enter upon the vendor's land, yet such license is revocable, at the pleasure of the vendor, at any time before it is acted upon by the vendee.

5. If, after a license has been given by the making of such a contract, and before it is revoked, the vendee enters upon the vendor's lands and severs the trees, the contract becomes executed, and the license is irrevocable.

6. If, after such contract has been made, and in pursuance thereof, the vendor severs and delivers the trees to the vendee, or permits the vendee to enter and sever them, the trees

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become chattels, and the title thereto will pass to the vendee.'

7. If the sale of the trees was a sale of the trees as chattels, the price was over fifty dollars; the purchaser did not receive any part of the property, did not give anything in earnest to bind the bargain, nor in payment, and there was no note or memorandum made in writing and signed by either party.

The principal and controlling question presented for our decision is, whether the contract set up in the answer was a contract for the sale of real estate, and therefore required to be in writing, or whether it was a contract for the sale of personal property. The decision of the question depends upon whether forest trees standing in the soil are regarded in the law as a part of the realty, or whether they are regarded as personal property. The question is not free from difficulty. Eminent text writers have expressed widely different views on the subject. The adjudged cases in England and in this country are not uniform. The number of text books and adjudged cases cited and relied upon by opposing counsel, and the confidence displayed by them, in their very able and elaborate briefs, in the correctness of the positions by them assumed, seem to render necessary a careful examination and review of the authorities bearing upon the question, with the view of determining upon which side of the question will be found the weight of authority and cogency of argument.

We will, in the first place, examine the authorities cited by counsel for appellant.

Section 271, 1 Greenleaf Ev. 305, is much relied on. It reads as follows:

"Sec. 271. The main difficulties under this head have arisen in the application of the principle to cases, where the subject of the contract is trees, growing crops, or other things annexed to the freehold. It is well settled that a contract for the sale of fruits of the earth, ripe, but not yet gathered, is not a contract for any interest in lands, and

so not within the statute of frauds, though the vendee is to enter and gather them. And subsequently it has been held, that a contract for the sale of a crop of potatoes was essentially the same, whether they were covered with earth in a field, or were stored in a box; in either case, the subject-matter of the sale, namely, potatoes, being but a personal chattel, and so not within the statute of frauds. The later cases confirm the doctrine involved in this decision, namely, that the transaction takes its character of realty or personality from the principal subject-matter of the contract, and the intent of the parties; and that therefore, a sale of any growing produce of the earth, reared by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land. In regard to things produced annually by the labor of man, the question is sometimes solved by reference to the law of emblements; on the ground, that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land. But the case seems also to be covered by a broader principle of distinction, namely, between contracts conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, and contracts for things annexed to the freehold, in prospect of their immediate separation; from which it seems to result, that where timber, or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still in the contemplation of the parties, evidently and substantially a sale of goods only, and so is not within the statute."

No authorities are referred to in the text, but those cited in the foot-notes do not sustain either the text or the conclusions in the notes, if it is intended to convey the idea that any property has been acquired in the trees before they are actually severed from the soil. 4 Kent Com. 450 and

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451, is referred to, but certainly does not sustain the text or the note. All that is said on the subject by the author has reference to the annual produce of the land; that is, growing crops, and not timber; while notes *d* and *2* and *3* are positive authorities in favor of the positions assumed herein by the appellee; and special attention is called to these notes as they appear in the 11th ed. of Kent's Com. 517. Long on Sales, pp. 76-81, is an authority not sustaining the text or note, as will be seen from the quotations in the note.

The *Bank of Lansingburgh v. Crary*, 1 Barb. 542, holds that growing trees, fruit, and grass, being parcel of the land, are within the statute of frauds, and until severed from the land, either actually or in contemplation of law, they cannot be conveyed, or contracted to be conveyed, by parol, or taken in execution as chattels.

The case of *Poulter v. Killingbeck*, 1 B. & P. 397, decided in 1799, has reference to renting a farm for a moiety of the crops instead of money rent.

The case of *Parker v. Staniland*, 11 East, 362, was a verbal contract for potatoes, then in the ground, a growing crop, and which is, and long has been, recognized as a chattel.

Crosby v. Wadsworth, 6 East, 602, was a verbal contract for mowing grass, which was held void under the statute of frauds.

Smith v. Surman, 9 Barn. & C. 561, was a verbal contract for timber, which, at the time, plaintiff was having cut down, most of it being then actually standing. The vendor was to cut the trees himself, and receive pay by the foot. It was held to be a sale of chattels. It was to be delivered as a chattel by the vendor.

Watts v. Friend, 10 Barn. & C. 446; A. agreed to supply B. with a lot of turnip seed, and B. agreed to sell the crop of seed produced therefrom at one pound one shilling per bushel, and Lord TENTERDEN held it was not an interest in land; for the thing agreed to be delivered would, at the time of delivery, be a chattel.

Bostwick v. Leach, 3 Day, 476, 484, was where machinery

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in a mill had been sold, and the distinction between machinery and growing timber is certainly obvious to every one.

Whipple v. Foot, 2 Johns. 418, decides that wheat growing on the ground is a chattel and liable to execution.

Stewart v. Doughty, 9 Johns. 108, has reference to emblements.

Frear v. Hardenbergh, 5 Johns. 276, was an action to recover for work and labor in building a house on land.

Austin v. Sawyer, 9 Cowen, 39, has reference to growing crops of wheat.

In *Erskine v. Plummer*, 7 Greenl. 447, the facts are somewhat complicated, but are sufficiently stated in the following extract from the opinion of the court: "The plaintiff entered under the contract, and by permission of the owner, cut the timber, carried it away, and paid the full consideration demanded. The actual receipt of the price constituted a sale of the timber, after it was severed, if it was not consummated before. After it was severed, there could be no pretence that it constituted an interest in land, and a sale thus made is entirely relieved from any objection arising under the statute of frauds." The syllabus of this case seems to have misled those who have referred to it. It is as follows: "A sale of timber by parol, to be cut and carried away by the vendee, seems not to be within the statute of frauds." There is nothing in the case to warrant this deduction. It will thus be seen that the facts and the decision are very different from the syllabus, and the case is one consistent with the general run of decisions, and in no respect adverse to the appellee in this case.

Chitty on Contracts, referred to, neither supports the conclusions of the text nor note. The author refers to the case of *Smith v. Surman*, *supra*, approvingly, and states as the result of the investigation, "the object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels. Here the vendor was to cut the trees

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himself. His intention was not to give the vendee any property in the trees until they were cut and ceased to be a part of the freehold. * * The defendant could take no interest in the land by this contract, because he could not acquire any property in the trees until they were cut." Chit. Con., 5th Am. ed., p. 301.

Miller v. Baker, 1 Met. 27, and *Whitmarsh v. Walker*, 1 Met. 313, are cited. The last case was the case of nursery stock, and the case of *Miller v. Baker*, *supra*, shows that the trees referred to were regarded in the light of growing crops.

In *Claflin v. Carpenter*, 4 Met. 580, the following propositions were stated:

"A contract for the sale of growing wood and timber, to be cut and removed by the purchaser, is not a contract for the sale of any interest in or concerning lands, etc., within the statute of frauds. Rev. Stat. Mass. ch. 74, sec. 1. Such a contract is to be construed as passing an interest in the trees, when they are severed from the freehold, and not any interest in the land. So it was decided in *Smith v. Surman*, 9 Barn. & Cres. 561. See Lord Abinger's remark (9 Mees. & Welsb. 505) on the decision in the case of *Smith v. Surman*, 9 B. & C. 561. *Bostwick v. Leach*, 3 Day, 484; *Erskine v. Plummer*, 7 Greenl. 447; *Whitmarsh v. Walker*, 1 Met. 313.

"The same principle is laid down in many other cases referred to in Chitty on Contracts, 5th Am. ed., 300-302, and cases referred to in Greenleaf on Evidence, sec. 271 and note.

"A license to enter upon the land of another, and do a particular act, or a series of acts, may be valid, though not granted by deed or in writing. Such a license does not transfer any interest in the land, although when granted for a valuable consideration, and acted upon, it cannot be countermanded."

These authorities have reference to growing crops, and cases where timber was to have been delivered as a chattel, or where the license had been executed, and the vendor estopped from denying the contract; and the learned author

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appears to have disregarded all these important elements, and drawn a deduction unwarranted by the authorities cited, and broader than is anywhere authorized.

Counsel for appellant has referred to Roberts on Frauds, Sugden on Vendors, and Washburn on Real Property, as supporting his view of the question under examination. It will be found upon examination of later editions of these works, that the learned authors have changed very materially and essentially their views upon the very passages to which reference is made.

Roberts on Frauds, page 126, is cited, and a lengthy quotation is made therefrom in appellant's brief. The edition referred to and quoted from is the 2d American ed., published in 1823. It is there said, that where grass and trees are "sold in prospect of separation, it is in contemplation of the parties a bare chattel." The author refers to the dictum in 1 Lord Raymond, as his authority. Turning back to the "advertisement" in the same volume, page 14, it will be seen that Mr. Roberts frankly confesses that this is not the law, and says: "In page 126, the reader will find, that on a slender foundation (being the only one which existed when that page was written), I have supposed a contract for the growing produce of land, as being made in prospect of severance, not to be for any interest in the land itself, and so not to fall within the fourth section of the statute of frauds. A case was, however, decided last Trinity Term in the court of King's Bench, which has determined otherwise." The case referred to is the leading case of *Crosby v. Wadsworth*, and which has since been firmly adhered to, by the English courts, as correct in principle.

Counsel also quotes from page 111, sec. 36, of the 6th American edition of Sugden on Vendors, published in 1843. In this edition, there is quite a lengthy discussion of the question, in which the author evidently inclines to the theory of the appellant in this case, but after this was written, the learned author revised and rewrote his book, and seems to have entirely changed his opinion, as will be observed by

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reference to the 8th American from the 14th London edition, published in 1873, where the whole of the section quoted by appellant in his brief, with much more upon this subject is omitted, and instead he states, on page 182, vol. I, that "an agreement to sell a crop which would go as emblements to an executor, *e. g.*, such as a crop of grass, can only be bound by a written contract; which applies equally to a sale of growing poles, or of standing underwood, and of course, therefore, to timber."

Again, counsel quotes from Washburn on Real Property, vol. 3, p. 301, where it is stated: "A man may grant trees growing on his own lands without deed. So he may corn in the ground, or fruit on the trees standing on his land, although these may not have been severed." This passage appears in the 1st and 2d editions of his work. In his 3d edition, however, published in 1868, he modifies his views. In the first volume of his last edition, page 8, will be found quite a lengthy discussion of the subject which does not appear in the other editions. Here Mr. Washburn takes the ground, that such a contract, as long as it remains executory, passes no title to the vendee; that it amounts to a "license rather than a grant of an interest in real estate, and though liable to be revoked, if executed carries the property in such of the trees as shall have been severed from the freehold. * * If it has not been executed, the whole rests in contract, and, so long as the timber or other product of the soil continues in its natural condition, and no act is done by the vendee towards its separation from the soil, no property or title thereto passes to the vendee." This view of the law is now generally received with favor.

Reference is also made to *Bostwick v. Leach*, 3 Day, 476, decided in 1809. But as this was a "parol contract for the purchase of mill-stones, running gears, bolts, tacklings, tools, and utensils belonging to, and removable from, a mill," it can hardly be said to be in point, and therefore it is unnecessary to notice it further.

The cases of *Smith v. Bryan*, 5 Md. 141, *Cain v. Mc-*

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Guire, 13 B. Mon. 340, and *Byassee v. Reese*, 4 Met. Ky. 372, are the cases upon which the appellant chiefly relies. In these cases, the broad ground is taken, that a verbal contract for the sale of growing trees is not for an interest in land. *Smith v. Bryan* is evidently not a well considered case. The authorities are not reviewed, not even referred to. It will be noticed that these cases recognize the fact that growing trees are a part of the land, but say that a verbal contract for the sale of them changes their character as property and converts them into personal property, and this, by holding that there is a constructive severance by reason of such contract.

The ruling in the two Kentucky cases is based upon the above section from Greenleaf, and it has been shown that the doctrine therein enunciated is not supported by the cases cited, and is in conflict with the general weight and current of authorities. Besides, the ruling in the above cases is in conflict with the ruling in the case of *Craddock v. Riddlesbarger*, 2 Dana, 205, where Mr. Chief Justice ROBERTSON says :

“Although such annual productions or fruits of the earth as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries, etc., are considered as incidents to the land in which they are nourished, and are, therefore, not personal, nevertheless, everything produced from the earth by annual planting, cultivation and labor, and which is therefore denominated, for the sake of contradistinction, *fructus industriae*, is deemed personal and may be sold, as personality, even while growing and immature.”

It is true, there is nothing said in the above opinion in reference to forest trees; but if clover, timothy, and the various kinds of fruit named, are incidents to the realty, and therefore not personal, does it not result, for a much stronger reason, that forest trees, not planted by the hand of man, are incidents to the realty, and therefore not personal property? We think the conclusion irresistibly follows.

This question has frequently been before the Supreme

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Court of Massachusetts, and that court has uniformly held the law to be as above stated. Counsel for the appellant refers to some of the decisions in that state as supporting his theory of this case, while in truth they are fatal to his answer, as a reference thereto will show.

Taking the decisions referred to, in the order in which they were rendered, first comes *Whitmarsh v. Walker*, 1 Met. 313. In this case, a parol contract had been made for "a great number of multicaulis mulberry trees," and these "were nursery trees, raised to be sold and transplanted." For this reason, it was insisted that they were "to be considered as personal chattels," and the court so held upon the authority of *Miller v. Baker*, 1 Met. 27. This view is entirely in accordance with the law, both in England and in this country. Such products of the soil are classed as "embllements," for they are considered as "articles of trade and merchandise." 1 Williams Ex. 613; 1 Redfield Wills, 152; Schouler Pers. Prop. 123; 2 Bl. Com. 389; *Penton v. Robart*, 2 East, 88; *Miller v. Baker*, 1 Met. 32. The case, however, turned upon another point that is wholly unimportant, as far as this case is concerned.

Next in order comes the case of *Clafin v. Carpenter*, 4 Met. 580. This case has already been referred to. Here the contract had been executed by sawing and removing the trees contracted for, and it was held that "such a contract is to be construed as passing an interest in the trees, when they are severed from the freehold, and not any interest in the land. A license to enter on the land of another, and do a particular act or a series of acts, may be valid, though not granted by deed or in writing. Such a license does not transfer any interest in the land, although when granted for a valuable consideration, and acted upon, it cannot be countermanded." Upon this point the case turned, and the rule here stated has been approved and explained in subsequent cases by the same court. This decision has been cited and quoted from by the appellant as an authority in his favor. Following this comes *Nettleton v. Sikes*, 8 Met. 34. This was an action of "tres-

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pass for breaking and entering the plaintiff's close, and cutting down and carrying away trees." Here a contract had been made, by which the defendant was to cut a number of oak trees, peel them, make them into wood, and was to have the bark "for his own use." After the trees were cut and peeled, and before the bark was removed from the plaintiff's land, the plaintiff forbade the defendant to take it away. It was held, that "when the bark was peeled it became the property of the defendant," and that "a beneficial license, to be exercised upon land, when acted upon under a valid contract, can not be countermanded."

This case was followed by *Nelson v. Nelson*, 6 Gray, 385, and *Douglas v. Shumway*, 13 Gray, 498. In each of these cases, it appeared that a license had been acted on by the vendee, who had entered on the land and cut the timber which was the subject of the sale, and "had thereby acquired a title to the wood as personal property."

In *Giles v. Simonds*, 15 Gray, 441, a case was presented where a sale had been made of growing trees, and after the vendee had entered upon the vendor's land and severed a part of the trees, the vendor forbade him to cut the remainder, and from removing those already cut. It was decided, that the vendor had a right to terminate the contract and revoke the license to the trees left standing, but he could not as to those already severed. This case, together with the cases of *Clafin v. Carpenter* and *Nettleton v. Sikes*, is referred to and approved in *Burton v. Scherpf*, 1 Allen, 133, where it is said: "A parol license by the owner of real estate, to enter or do any particular act upon it, may commonly be revoked at any time before the object and purpose for which it was conceded has been fully availed of, or wholly accomplished."

Next comes the important case of *Drake v. Wells*, 11 Allen, 141, which was an action for trespass. A quantity of growing trees had been sold at auction, and afterward the land was conveyed by deed, with no reservation of the trees. The trees were cut and taken away, and the owner of the land

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brought the action, and it was held that he should recover, as a conveyance of the land amounted to a revocation. It is said in the opinion: "So long as the timber or other product of the soil continues in its natural condition, and no act is done by the vendee towards its separation from the soil, no property or title passes to the vendee. The whole rests in contract. A revocation of the license to enter on the land does not defeat any valid title; it does not deprive an owner of chattels of his property in or possession of them. The contract being still executory, no title has passed to the vendee." The preceding cases are then referred to, and the court continues: "Taking the most favorable view of these cases in behalf of the defendants, they had acquired no title to the wood standing on the land of the plaintiff. They had only an executory contract for the purchase of the trees growing on the premises, with a license from the plaintiff's grantor to enter and cut and remove the same. This license, not being acted on, was revocable." Such is the law in Massachusetts.

It is claimed by counsel for appellant, that the decision of this court in *Wright v. Schneider*, 14 Ind. 527, is decisive of the question under examination in his favor. As the opinion of the court is very short, we will reproduce it entire:

"*Per Curiam*.—Suit for the price of fifty timber-trees, sold and marked upon the ground, and to be taken away by the purchaser. The price was agreed upon. The suit was commenced before a justice of the peace. There was a recovery before the justice by the plaintiff; and so there was, on appeal, in the circuit court. The trees were cut and taken away by the defendant, at such time as suited his convenience. Upon such a contract, it seems, that the sale is complete when the trees are marked.

"We are unable to perceive the reason why this cause was appealed to this court.

"No question is made except upon the evidence. But the record does not purport to contain all the evidence.

"Again. On the evidence in the record, the case falls within the rule in criminal cases. The judgment is right

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beyond not only a reasonable doubt, but beyond any doubt whatever.

"The judgment is affirmed, with ten per cent. damages and costs."

The above case does not seem to have received much consideration. No authority is cited. The only language in the opinion which supports the views of counsel for appellant, are the words: "Upon such a contract, it seems that the sale is complete when the trees are marked." The remark was not called for, for the action was upon an executed contract.

Before the action was brought, "the trees were cut and taken away by the defendant, at such times as suited his convenience." The defendant had severed the trees and taken them into his possession by removing them from the plaintiff's land, and then the plaintiff brought suit for the price agreed to be paid for the trees. The contract was no longer executory, and the defendant having severed and taken the trees, it would have been strange indeed if he were not held for the value of them. The object of the statute was to guard against, and not to protect frauds. *Eastburn v. Wheeler*, 23 Ind. 305. It made no difference "that the suit was brought upon the original express agreement, and for the price therein agreed upon." In truth, it should have been brought in no other manner, for the contract by being executed had become binding, and no longer within the statute of frauds.

It is a well settled rule, that in regard to all verbal contracts for the sale of lands, a substantial part performance takes them out of the operation of the statute. *Pearson v. East*, 36 Ind. 27; *Stater v. Hill*, 10 Ind. 176; *Moreland v. Lemasters*, 4 Blackf. 383. And in such case a court of equity will enforce a specific performance. 1 Story Eq. Jur. 754; Fry on Spe. Per. 252. But the question as to the validity of the contract was not before the court in *Wright v. Schneider*, *supra*, as counsel presume, for it is said in the opinion, "no question is made except upon the evidence." In *Selch v. Jones*, 28 Ind. 255, however, the question was directly

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involved. Here the action was trespass for cutting and removing timber. The defendant answered, that he had a license to do the acts complained of, by virtue of a verbal contract for the sale of the trees cut and removed, and that the contract had been executed ; and this was properly held to be a good plea in bar of the action.

The court say: " We think that the answer, though bad in form for argumentativeness, was good on demurrer, and was equivalent to the defence of license from the plaintiff. The contract for the timber not being in writing, and being for an interest in land, was not good under the statute of frauds, and the conveyance by Morrow passed the timber to the plaintiff and revoked the license, which otherwise would have been a good defence to the action for trespass. But acquiescence by the plaintiff in the license from Morrow was equivalent to a new license from the plaintiff, and was good as a defence."

It is expressly held in the above case, that the contract for the sale of timber was a contract for an interest in land, and not being in writing, was void under the statute of frauds ; but as the timber was taken away under a license, the party was not liable as a trespasser.

Finally, counsel for appellant refers to Browne on the Statute of Frauds. That learned author, in sec. 248, p. 251, lays down this rule, among others, for determining whether such contracts are within the statute of frauds : " If the benefit of the soil is contracted for by the purchaser of the crop, if it be in the contemplation of the parties that the purchaser shall use the vendor's land in the interval between sale and delivery, for the purpose of raising the crop which when matured is to belong to the purchaser, then clearly the contract is for an interest in the land. It is distinguished by form only from a lease of the land for that purpose ; for it can make no difference whether the cultivation is to be by the purchaser himself or by his agent, the vendor. * * 'The legislature contemplated an interest in land which might be made the subject of sale. I think,

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therefore, they must have contemplated the sale of an interest which would entitle the vendee either to the reversion or to the present possession of the land.'"

The same learned author, in sec. 249, p. 252, says: "The general rule, therefore, furnished us by the cases we have had under review, would seem to be this: If the contract when executed is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the statute; but if the contract is in the *interim* to confer upon the purchaser 'an exclusive right to the land for a time for the purpose of making a profit of the growing surface,' it is affected by the statute and must be in writing, although the purchaser is at the last to take from the land only a chattel."

All the cases cited in support of the above doctrine relate to the sale of the annual products of the soil, except the case of *Smith v. Surman*, 9 Barn. & C. 561. In that case, the contract was not for the sale of growing timber, but for the timber at so much per foot; that is, the produce of the trees when they should be cut down and severed from the freehold. The doctrine stated in the above quotation from Browne is materially modified by that author in sec. 250, where he says: "But there is another doctrine upon this subject which has attracted much favor of late years, and that is that the application of the statute is to be determined by the character of the growing crop; verbal contracts for the *fructus industriaes*, or growing grain, vegetables, etc., which are produced by periodical planting and culture, which at common law are considered as emblements, which go to the executor, and which are leviable in execution, being good, and verbal contracts for the *prima vestura*, or growing trees, grass, fruit, etc., which at common law go to the heir, as of the realty, being not good." See *Smith v. Dodds*, 35 Ind. 452; *Lindley v. Kelley*, 42 Ind. 294.

We turn now to the examination of the propositions contended for by counsel for appellee.

The technical meaning of the word "land" is well under-

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stood among lawyers. "The word 'land,' and the phrases 'real estate,' and 'real property,' include lands, tenements and hereditaments." 2 G. & H. 336. Thus it will be seen that the word "land," in its legal signification, embraces much more than the word literally imports, and of course the word, as used in the fourth specification of the first section of our statute of frauds, will be construed in connection with the definition given in the above statute. Hereditaments are included in the statutory definition of the word land; "lands, tenements and hereditaments," is the language. "Hereditaments" is the largest and most comprehensive word, including not only lands and tenements, but whatever may be inherited." 1 Cruise Dig. 54. See 1 Washb. Real Prop. 21; 2 Bl. Com. 16; Co. Lit. 2. Such is also the common law definition: "Land comprehendeth, in its legal signification, any ground, soil, or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It has also in its legal signification an indefinite extent, upwards as well as downwards." 1 Cruise Dig. 54. See 1 Inst. 4; 4 Bl. Com. 18; 3 Kent. Com. 402. "The word land is comprehensive in its import, and includes many things besides the earth we tread on, as waters, grass, stones, buildings, fences, trees, and the like." *Green v. Armstrong*, 1 Denio, 554.

Growing trees are regarded as a part of the land to which they are attached. This is well illustrated by the rule in regard to what is termed "emblements," and as to what will pass to the executor, and what to the heir. Whatever the law will treat as "emblements" will, as between vendor and vendee, when the statute of frauds is applied, be regarded as "bare chattels," "and it is now well settled, that the term only extends to such crops as are the result of special labor and cultivation, and which commonly compensate such labor within the year." 3 Redfield Wills, 151. "The doctrine of emblements extends not only to corn and grain of all kinds, but to everything of an artificial and annual profit, that is produced by labor and manurance." 1 Williams Ex. 631. But growing fruits, grass, trees, and other products of the

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soil, not produced annually by labor and cultivation, are not included in the term, but are regarded as a part of the land, and will pass to the heir. Toller Law of Executors, 193; Roberts Frauds, 365; 1 Williams Ex. 631; 3 Redfield Wills, 152; 1 Denio, 554, 581; 1 Barb. 544; 27 Vt. 157; 35 Miss. 700; 45 N. H. 313; 33 Penn. St. 376. The rule established between the executor and the heir, drawing the distinction between the *prima vestura* and *fructus industriaes*, is important in the consideration of the question presented in this case, for it is the line of distinction now generally regarded as decisive.

Trees cannot be levied upon and sold as personal property. See authorities above cited. So growing trees will pass to the mortgagee of land as a part thereof, and he may have an injunction to prevent the mortgagor, or other person, from cutting and removing them, if thereby his security is impaired. *Hutchins v. King*, 1 Wal. 53; *Salmon v. Claggett*, 3 Bland, 180; *Brick v. Getsinger*, 1 Halst. Ch. 391. See, also, *Waterman v. Matteson*, 4 R. I. 539; *Page v. Robinson*, 10 Cush. 99; *Stowell v. Pike*, 2 Greenl. 387; *Langdon v. Paul*, 22 Vt. 205; *Sanders v. Reed*, 12 N. H. 558; *Frothingham v. McKusick*, 24 Me. 403.

A trustee under a power of sale "cannot sell the timber from the land, nor the land reserving the timber." *Perry Trusts*, 724.

In England, a verbal contract for the sale of growing trees is clearly recognized as being within the statute of frauds as an interest in lands. There is one case, which is referred to as an early English case by the appellant, and is sometimes referred to by text-writers as an authority. The propriety of calling this case an authority is at least doubtful. It is reported anonymously in 1 Ld. Raymond, 182, and the report consists of what TREBY, C. J., told the other judges about a ruling he had made "at nisi prius at Guildhall," that he had held, that growing timber might be sold by parol "because it was but a bare chattel." This is all there is of this case, and it is not strange that HULLOCK, B., should remark

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in the case of *Scorell v. Boxall*, 1 Y. & J. 396, that he had "never heard this *dictum* referred to as an authority."

The case of *Crosby v. Wadsworth*, 6 East, 602, decided in 1805, is the leading English case upon this subject. In this case, the plaintiff verbally agreed to purchase of the defendant a "standing crop of mowing grass," to be made into hay by the plaintiff. Before the plaintiff had done any act, the defendant notified him that he could not have the grass, and sold it to another man. The agreed price was tendered and refused. This agreement Lord ELLENBOROUGH held to be a sale of an interest in land and within the statute of frauds. In *Teall v. Auty*, 4 Moore, 542, decided in 1820, there was a sale of growing trees, which were cut and carried away. The court were of the opinion that "the agreement was originally for the purchase of an interest in land, for when it was made, the poles were growing." Very similar is the case of *Smith v. Surman*, 9 Barn. & C. 561, decided in 1829. This was a case of a verbal sale of timber at so much per foot. The timber at the time was "being cut down" by the vendor, the "most of it being actually felled." BAYLEY, J., said, "The contract was not for the growing trees, but for the timber at so much per foot. * * * The vendor, so long as he was felling it and preparing it for delivery, was doing work for himself and not for the defendant." For this reason the contract was held not to be within the statute. *Scorell v. Boxall*, 1 Y. & J. 396, (1827,) is the next case, and is directly in point. This was an action for trespass for cutting and carrying away underwood. The question presented was, whether the plaintiff, who had verbally purchased the underwood, had such a possession as would enable him to maintain the action. ALEXANDER, C. B., said: "This is a mere parol contract for the sale of growing underwood, part of the freehold, and in direct violation of the statute of frauds. It seems to me to be clearly a contract relating to the sale of an interest in land, which by the statute must be in writing." *Evans v. Roberts*, 5 Barn. & C. 829, (1826) was on a verbal agreement for the purchase of "a

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cover of potatoes, to be turned up by plaintiff." This was held to be a contract for the sale of chattels; and was said to be unlike "growing trees, which is the natural and permanent produce of the land, renewed from time to time without cultivation. * * * Now this contract only gives to the vendee an interest in that growing produce of the land which constitutes his annual profit." To the same effect are the cases of *Warwick v. Bruce*, 2 Maule & S. 205; *Parker v. Staniland*, 11 East, 362; *Sainsbury v. Matthews*, 4 Mees. & Wels. 343. In *Rodwell v. Phillips*, 9 Mees. & W. 501, a parol contract had been made for the purchase of a lot of growing fruits, and the question was, whether this contract was within the statute of 55 Geo. III, c. 184, requiring a stamp upon an agreement for an interest in lands. It was held that it was. Lord ABINGER, C. B., said: "Growing fruit would not pass to an executor, but to the heir; it could not be taken by a tenant for life, or levied in execution under a writ of *fi. fa.* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir at law, but to some other person. Undoubtedly there is a case in which it appears that a contract to sell timber growing was held not to convey any interest in the land, but that was where the parties contracted to sell the timber at so much per foot, and from the nature of that contract it must be taken to have been the same as if the parties had contracted for the sale of timber already felled." *Smith v. Surman* was the case referred to by the learned judge.

But nowhere has the law upon this question been stated with so much force and clearness as by Chief Baron Joy, of the Irish Bench, in the case of *Dunne v. Ferguson*, Hayes, 540. In this case the defendant had sold the plaintiff five acres of turnips, and while they were growing, the defendant severed and converted a part of them to his own use, and trover was brought by the plaintiff. Among other things, the learned judge said: "At common law, growing crops were uniformly held to be goods; and they were subject to all the legal consequences of being goods, as seizure in execution, etc. The

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statute of frauds takes things as it finds them ; and provides for lands and goods, according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop had been held to be an interest in lands it would bring them within the statute. * * * And as we think that growing crops have all the consequences of chattels, and are, like them, liable to be taken in execution, we must rule the points raised for the plaintiff."

Thus the law in England may be considered as settled, and the question, whether products of the earth constitute an interest in lands within the statute of frauds or not, is solved by reference to the subject-matter, as to whether it consists of *fructus industriaes*, or is the mere spontaneous production of the earth. The decisions of the English courts are important, for the reason that "our statute of frauds is substantially that of Charles II. With the statute, the courts generally adopt the English construction as good authority." *Bowman v. Conn*, 8 Ind. 58.

Turning now to the American courts, we will find that the English decisions are very generally upheld. The case of *Green v. Armstrong*, 1 Denio, 550, is a leading case, and the identical question under consideration was before the court. The plaintiff had by a verbal contract purchased growing trees of the defendant, and the defendant had afterward forbidden the plaintiff to cut and remove them. In the opinion it was said: "The precise question in this case is, whether an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in land." It being the first time that the question had been before the court, the judge who gave the opinion said: "We are, therefore, at full liberty to adopt a broad principle, if one can be found, which will determine this precise question in a manner which our judgments shall approve." The court then approve the rules adopted in *Rodwell v. Phillips* and *Dunne v. Ferguson*, and distinguish between products which are the result of annual

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labor and cultivation, and those of a spontaneous growth, and say, "These principles suggest the proper distinction." The authorities are referred to in this case and the subject ably discussed, and the contract made held to be clearly a contract for the sale of an interest in lands and within the statute.

The same question was presented in the case of *The Bank of Lansingburgh v. Crary*, 1 Barb. 542. The point there was, whether growing grass could be levied upon as a chattel under an execution against the same, by consent verbally given. The court held, after a full discussion of the subject, that the grass was "an interest in land," and "could not be seized as chattels until severed from the land."

In *Warren v. Leland*, 2 Barb. 613, the question arose as to the character of the writing required to convey growing trees, "they being an interest in lands." The subject was ably reviewed, and the case of *Green v. Armstrong* approved as being correct in principle.

Again, in *Pierrepont v. Barnard*, 5 Barb. 371, it was held, that "the trees were real estate, and could not pass, except by an instrument in writing." This case was carried to the court of appeals, and reversed upon another ground, which will become important in another part of this opinion. The fact, however, that growing trees were an interest in lands was firmly adhered to. See *Pierrepont v. Barnard*, 2 Seld. 279.

In *McGregor v. Brown*, 6 Seld. 117, the court, *per EDWARDS, J.*, announced the same doctrine, and in reference to *Green v. Armstrong*, said: "This decision, as far as I am aware, has been received with approbation, and may be considered as the settled law of this State."

In *Silvernail v. Cole*, 12 Barb. 685, and in *Bennett v. Scutt*, 18 Barb. 347, the Supreme Court declares the law to be as above stated, and so does the court of appeals, in *Killmore v. Howlett*, 48 N. Y. 569.

This question has been before the Supreme Court of New Hampshire a number of times, and the court has uniformly

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held that verbal contracts for the *prima vestura* were within the statute of frauds. It was so held in *Putney v. Day*, 6 N. H. 430, and in *Olmstead v. Niles*, 7 N. H. 522.

In the case of *Kingsley v. Holbrook*, 45 N. H. 313, the question was directly before the court, and was elaborately discussed in the opinion given. It was there said: "But the word land is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on, and all pass under the general description of land in a deed. Standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support, and, upon the death of the ancestor, they pass to the heir, as a part of the inheritance, and not to the executor, as emblements, or as chattels. Neither can they be levied upon and sold on execution, as chattels, while standing. This being the case when the statute of frauds was passed, it has since then been properly held, we think, that a sale of growing trees, with a right at any future time, whether fixed or indefinite, to enter upon the land and remove them, does convey an interest in the land."

In the State of Vermont, the same rule has been adopted and adhered to. In the well considered case of *Buck v. Pickwell*, 27 Vt. 157, the cases were reviewed and the subject examined at length in an elaborate opinion by BENNETT, J., and it was held that an agreement for the sale of growing trees, with the right of the vendee to enter and sever them, and take them off at any future time, was within the statute, and must be in writing, to be available. He refers to the English cases that distinguish between the *prima vestura* and *fructus industriaes* as being correct in principle.

In *Ellison v. Brigham*, 38 Vt. 64, the subject was again considered. This was a suit upon a verbal agreement, in which the defendant had contracted to cut down all the trees on a certain tract of land fit for logs, and deliver them at a mill. The defendant refused to comply. Held, that the contract was within the statute; and it was said that the fact that the trees were to be made into logs was unimportant, for

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"the logs contemplated by the contract were the trunks of the trees standing; they would be the trunks of the trees when delivered at the mill, and nothing else." The learned judge also remarked that "the inclination of the courts of England and in this country, at the present time, is to limit rather than extend the class of cases that are excepted from the operation of the statute." These cases were approved by the same court in *Sterling v. Baldwin*, 42 Vt. 306.

The same view of the law has been decidedly taken by the Supreme Court of Mississippi. The case of *Harrell v. Miller*, 35 Miss. 700, was an action to enforce a verbal contract for the sale of trees. An able opinion was given by HANDY, J., in which he refers to and approves the rule recognized in *Green v. Armstrong*, and in the English cases, and says: "When the statute speaks of lands, tenements, and hereditaments, it must be understood to refer to them, in such sense as the terms imported at common law; and, according to the principles above stated, growing trees must be considered as pertaining to the soil, and embraced by the terms of the statute." And thus stands the law in the State of Mississippi.

In Pennsylvania the decisions are to the same effect. In *Yeakle v. Jacob*, 33 Penn. St. 376, and in *Huff v. McCauley*, 53 Penn. St. 206, the subject was discussed and held as in the states above referred to.

In the case of *Patison's Appeal*, 61 Penn. St. 294, it was again before the court, and in the opinion it is said: "It would strike the unprofessional mind with scarcely less surprise than it would the professional, if it were announced that the growing timber on a man's land might be held by a contract in parol, against everybody, whilst the soil itself could only be legally transmitted by an instrument in writing; that what we have been accustomed to consider an integrant part of the freehold, the growing timber, might be sold and transmitted with no more solemnity than a pile of boards at a saw-mill, or bushels of wheat in a barn. * * * If such interests might pass by parol, or word of mouth, and become mere

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chattel interests, they would in time be liable in the hands of owners, to seizure and sale by sheriffs and constables as personal chattels. From such a condition of things nothing but inextricable confusion could possibly follow. * * * The distinction in the English books between the *prima vestura* and the *fructus industriaes* of land, namely, the natural growths and the products of agriculture, has always been regarded with us." And thus the law in Pennsylvania is settled against the theory of the appellant.

In the State of New Jersey, the same rule has been substantially adopted.

In *Scotten v. Brown*, 4 Harring. Del. 324, it was agreed by parol that a party should have the proceeds of a certain meadow for three years as a compensation for clearing it. Held an interest in land and within the statute. In the opinion, it is stated, that "it is well known that a distinction has long existed between perennial productions of the earth and the annual fruits of annual labor. In almost all cases the latter is now regarded as a mere chattel."

Analogous to an agreement for the sale of growing trees by parol is the sale of ore in a mine. When the ore is severed from the land in which it is imbedded, it becomes a mere chattel; until then it is a part of the freehold.

In *Riddle v. Brown*, 20 Ala. 412, a verbal contract had been made for the right to "dig and carry away ore" from a mine, and it was decided that this agreement "was devoid of efficacy as a contract of sale, because not in writing," and within the statute.

Anderson v. Simpson, 21 Iowa, 399, was a similar case, and was decided in the same manner and upon the same grounds.

"An agreement for the sale of growing grass (*prima vestura*), growing timber, or underwood, growing fruit and hops, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land, as such things are not distinguishable from the land itself in legal contemplation until actual severance, and pass to the heir, and

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not to the executor." Ad. Con. 54. Addison draws the distinction between *prima vestura* and *fructus industriaes*.

The remarks of Judge Story, in his work on Contracts, vol. 2, sec. 1015 *x*, are entitled to great consideration :

"Where the contract is for things growing on the land, which are such as would go to the heir, it is within the statute; when it is for such crops as would go to the executor, or may be sold on execution, it is a sale of chattels not within this clause. Another way of putting the distinction is between annual productions caused by the labor of man which are not within the statute, and the annual productions of nature not referable to the industry of man except at the period when first planted, which are within the statute. Under the former class are growing crops of grain and vegetables. Under the latter class are growing trees, fruit, and grass, not severed from the land. If they be severed from the land, they become of course mere chattels."

See, also, 1 Hilliard Con. 404, sec. 38: "Growing trees are real estate, and can not pass, except by an instrument in writing. In some cases, importance has been attached to the stipulation that the trees are to be taken by the purchaser within a certain time. But the distinction is made, that an agreement for the sale of growing trees, with a right to enter on the land at any future time and remove them, is within the statute, but, after such sale, they become personal property and may be verbally transferred." See, also, note 5 and note *a*, same page. Also, see 4 Kent Com. (11 ed.) 517, and notes *d* and 2 and 3.

Viewed from another standpoint, it will be seen that the amended answer filed does not constitute a bar to the action as brought. It is alleged in the answer, "that about the time he" (appellant) "commenced to cut and remove said trees, as above stated, the plaintiff gave him notice not to cut and remove said trees from his said lands, which notice of plaintiff the defendant disregarded, and proceeded to, and commenced to, cut and remove said trees." If a verbal contract for the sale of growing trees amounts to a license merely to

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enter upon the vendor's land, here was an express revocation of the license given in the case before any act was done in pursuance thereof by the vendee, and the admission of this constitutes one of the allegations in the answer filed. What is the effect of this?

A contract that is required to be in writing by the statute of frauds is not invalid if made by parol. "The statute only inhibits all actions brought to enforce it." *Hadden v. Johnson*, 7 Ind. 394. See, also, *Crosby v. Wadsworth*, 6 East, 602; *Browne Frauds*, 118. "It is only voidable, and not void." *Mather v. Scoles*, 35 Ind. 1. "But where the contract has been in fact performed, the rights, duties and obligations of the parties resulting from such performance, stand unaffected by the statute." *Stone v. Dennison*, 13 Pick. 1. See *Browne Frauds*, 114; 7 Ind. 397.

This action being for a trespass in unlawfully entering upon lands, a plea of license from the owner of the land to do the act complained of would be good as a plea in bar, for "a license will be a full justification for all acts done in pursuance of its terms." 2 Am. L. Cas. 752. A parol license to enter on lands will excuse what would otherwise be a trespass. Chit. Con. 326; Hilliard Vend. 125. "A dispensation or license passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful." *Thomas v. Sorrell*, Vaugh. 330, 351. A license confers only a privilege, and does not pass an estate, and may be revoked or countermanded at any time by the licensor. *Simpkins v. Rogers*, 15 Ill. 397; *Mumford v. Whitney*, 15 Wend. 380; *Cook v. Stearns*, 11 Mass. 527; Washb. Easements, 6; *Ex parte Coburn*, 1 Cow. 568. "A license cannot be made available in any way as a contract." Chit. Con. 426. In some instances a license may become irrevocable; as where the licensee has made expenditures upon the faith of the license, unless the licensee can be placed *in statu quo*. *Stephens v. Benson*, 19 Ind. 367; *Lane v. Miller*, 27 Ind. 534. "A license cannot be revoked

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as to acts done under it. The revocation is prospective, not retrospective." *Snowden v. Wilas*, 19 Ind. 13.

A parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee, as in this case, will amount to a license for the vendee to enter upon the vendor's land, for the purpose of making such severance, and if such license is not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license after severance will become coupled with an interest and irrevocable, and the vendee will have a perfect right to enter and remove the trees thus severed; but if before the trees are severed, the vendor should revoke such license, no title will pass to the vendee, and no rights will vest by virtue of such contract.

The following authorities, some of which have already been cited on another point, will fully support the views hereinbefore expressed: *Pierrepont v. Barnard*, 2 Seld. 284; *Drake v. Wells*, 11 Allen, 141; *Giles v. Simonds*, 15 Gray, 441; *McNeal v. Emerson*, 15 Gray, 384; *Nettleton v. Sikes*, 8 Met. 34; *Heath v. Randall*, 4 Cush. 195; *Barnes v. Barnes*, 6 Vt. 388; *Mumford v. Whitney*, 15 Wend. 380; *Smith v. Benson*, 1 Hill N. Y. 176; *Russell v. Richards*, 1 Fairf. 429; *Riddle v. Brown*, 20 Ala. 412; *Bennett v. Scutt*, 18 Barb. 347; *Douglas v. Shumway*, 13 Gray, 498; *Erskine v. Plummer*, 7 Greenl. 447; 1 Washb. Real Prop. 8, 3 Am. ed.; *Schouler Pers. Prop.* 125; *Selch v. Jones*, 28 Ind. 255.

This leaves for our examination the seventh proposition stated by counsel for appellee. That is, that if the sale of the trees was a sale of the trees as chattels, it was void; because there was no money paid as earnest, nor part payment, there was no writing, and no part of said property was received by the appellant.

The seventh section of the statute of frauds and perjuries, 1 G. & H. 351, reads as follows:

"No contract for the sale of any goods, for the price of fifty dollars or more, shall be valid, unless the purchaser

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shall receive part of such property, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The price was more than fifty dollars; nothing was paid in earnest to bind the bargain, nor in part payment, nor was any memorandum made in writing of the bargain. Did the defendant receive said property, or any part of it, so as to take the contract out of the statute? To receive implies the concurrent acts of delivering by the vendor and acceptance by the vendee. It signifies a change of possession from the vendor to the vendee. A delivery is a parting with the power over property by the seller, with a view to its surrender to the purchaser. 1 Bouv. Dict. 453; *Cloud v. Moorman*, 18 Ind. 40; Wharton Law Dict. 223; 2 Parsons Con. 41.

Acceptance would be a taking of the possession and an assuming of the power over the property. The trees were not chattels while they were growing. Growing trees are a part of the real estate until they are severed. 1 Washb. Real Prop., 3d ed., pp. 8, 9; Browne Frauds, 260, sec. 143; Addison Con. 54; *Giles v. Simonds*, 15 Gray, 441; *Douglas v. Shumway*, 13 Gray, 498; 1 Denio, 550; and many other authorities hereinbefore cited.

While the vendor owns the real estate and the trees are standing and growing on it, the possession remains in him, and no delivery can take place short of transferring to the vendee the possession of and an interest in the real estate. There was no severance of the trees from the soil at the time the contract was made, June 25th, 1872. Owens commenced cutting the trees July 9th, 1872.

Although the answer says the plaintiff then and there delivered to the defendant, and the defendant then and there accepted, these expressions must be taken in connection with the other averments, and amount to nothing. At the time of the sale, the trees were standing and growing; all

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that occurred amounted to an agreement upon the terms. Before a tree was cut, the money was offered and refused, and the contract rescinded, and the license to enter and sever and remove the timber revoked. No act of taking possession by the vendee, or of parting with it by the vendor, had ever occurred. The allegations in the complaint in regard to the trees constitute a part of the contract. The acts of delivery and acceptance, mentioned in the statute, are something over and beyond the agreement, of which they are a part performance. There must be some act over and beyond the words of a contract, to amount to a delivery. The seller must relinquish his dominion over the property and put it in the power of the vendee. Even in symbolical delivery this is the case; by delivering the key of the warehouse, or directing the bailee of the goods to deliver them to the vendee. Although it is true that it is not always easy to make an actual delivery of bulky and ponderous articles, there are other ways of satisfying the statute of frauds. The parties may put their contract in writing, or the purchaser may pay part or all the money. *Shindler v. Houston*, 1 Comst. 261; *Brabin v. Hyde*, 32 N. Y. 519; *Denny v. Williams*, 5 Allen, 1; *Snow v. Warner*, 10 Met. 132. The case of *Shindler v. Houston* is a leading case, in which all the authorities are reviewed, and it is referred to in the notes to 3 Parsons Con. 41, Smith Mercantile Law, 608, and 2 Kent Com., 11th ed., 502. In *Shindler v. Houston*, of the doctrine cited from the Pandects, that the consent of the party upon the spot is sufficient possession of a column of granite, which by its weight and magnitude was not susceptible of any other delivery, the court say that the Roman law has nothing in it analogous to our statute of frauds; and further, that it is fairly to be inferred that the consent of the vendor, that the purchaser should take possession, was subsequent to the sale.

In our opinion, the ruling of the court below was correct in sustaining the demurrer to the answer.

The judgment is affirmed, with costs.

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LANDERS ET AL. V. DOUGLAS ET UX.

MARRIED WOMAN.—*Failure to Plead Coverture.*—If a married woman fails to make the defence of coverture to an action on her contract, and a judgment is rendered thereon, she is bound by the judgment.

From the Brown Circuit Court.

F. T. Hord, for appellants.

W. W. Herod and F. Winter, for appellees.

WORDEN, C. J.—This was an action by the appellee Louisa Douglas, joining with her husband, Charles G. Douglas, against the appellants. The material facts stated in the complaint are, that the plaintiff Louisa, while she was covert, executed two promissory notes, together with Amos Palmerlee and George Staples, as sureties for her said husband, to Landers, Tarkington, and Patterson, for a debt which the payees held against her husband; that the payees of the notes had full knowledge of the coverture of said Louisa at the time of the execution of the notes; that afterward the payees of the notes took judgment by default thereon against the said Louisa and the other makers thereof, in the court of common pleas of Brown county, and have issued an execution thereon, and that the sheriff has levied the same upon the property of the said Louisa and is about to sell the same. Prayer for an injunction, etc., and that the judgment may be set aside.

There was a demurrer to the complaint for the want of sufficient facts, but it was overruled, and exception taken. Such further proceedings were had as that the judgment against the said Louisa was declared null and void and the defendants enjoined from enforcing the same by execution or otherwise.

This judgment must be reversed. A married woman may interpose the defence of coverture to an action against her upon her contracts, but if she fails to make defence, and lets judgment go against her by default, she is as much bound by the judgment as if she had not been under coverture.

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The defence of coverture must be interposed to an action, like that of infancy, or, indeed, any other defence; but if not at the proper time interposed, a judgment rendered on the contract of a married woman will be as valid as if no such defence ever existed. *McDaniel v. Carver*, 40 Ind. 250; *Van Metre v. Wolf*, 27 Iowa, 341; *Elson v. O'Dowd*, 40 Ind. 300. The demurrer to the complaint should have been sustained.

The judgment below is reversed, with costs, with instructions to the court below to sustain the demurrer to the complaint.

BUTLER *v.* HOLTZEMAN ET AL.

From the Monroe Circuit Court.

J. H. Louden and J. H. Rogers, for appellant.

PETTIT, J.—This suit was brought by the appellees against the appellant and ten others. Judgment was rendered against all of the defendants; one only has appealed and assigned errors, without taking any steps under sec. 551, 2 G. & H. 270; and under the uniform ruling of this court the appeal must be dismissed.

The appeal is dismissed, at the costs of the appellant.

BUSKIRK, J., being related to one of the appellees, was absent.

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PRACTICE.—*Review of Judgment.*—**Parties.**—A person who is not a party to an action, or an heir, devisee, or personal representative of a deceased party or otherwise in privity, cannot be affected by the judgment therein, and cannot sustain a proceeding to review the judgment.

PLEADING.—*Complaint for Review.*—A complaint for review must bring before the court a record of the proceedings and judgment sought to be reviewed. A reference to the proceedings sought to be reviewed is insufficient.

SAME.—*Cause of Action Perfected before Suit.*—A complaint by a party claiming an interest in real estate or the proceeds thereof, as heir of one taking an interest in the estate after the termination of a life estate, must show that the person in whom the life estate vested was dead before the commencement of the suit.

SAME.—*Complaint for Recovery of Money.*—A complaint that asks a judgment for an amount in money, as well as a review of a judgment, to which the plaintiff was not a party and by which he is not bound, may be sustained as a complaint for the recovery of money, though not good as a complaint for review.

PRACTICE.—*Joint Demurrer.*—Where two or more parties unite in demurring to a pleading, if the demurrer is not well taken as to all of them, it must be overruled as to all.

CONVEYANCE.—*Construction.*—*Remainder.*—*Trust Deed.*—Where, by the terms of a trust deed, a life estate is given to A., remainder for life or during widowhood to four females, B., C., D., and E., with remainder in fee to their children, the children of each to inherit and receive the share of their mother, the fee simple does not vest in B., C., D., and E.

SAME.—*Words.*—“*Children.*”—The word “children” in such case is not to be understood as a word of limitation. It is a word of purchase.

SAME.—“*Inherit.*”—The word “inherit,” as used in such deed, indicates that the children shall take by families, and not as individuals.

SAME.—*Shelley's Case.*—The use of the word “children” in such deed does not bring the case within the rule in Shelley's case.

SAME.—*Vested Interest in Children.*—An interest in the lands, by virtue of the deed of trust, vested in the children of B., C., D., and E.

SAME.—*Remainder.*—*Contingency.*—The remainder in such case is not limited on a contingency which operates to abridge or destroy the particular estate. The contingency of death or marriage is in the particular estate, and not the remainder.

SAME.—*Vested Estate.*—The trust deed gave the children of C. a vested remainder, to take effect in possession upon the death or marriage of C.

SAME.—The death of F., a daughter of C., who was living at the time of the execution of the deed of trust, but who died before C., could not destroy or forfeit the estate of F., but at her death it descended to her son.

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REMAINDER.—Personal Property.—A remainder may be created in personal property as well as in real estate.

PRACTICE.—Joint Demurrer.—Assignment of Error.—Where a joint demurrer of several defendants to a complaint, good as to a part of the defendants, is overruled and judgment is rendered on demurrer for the plaintiff, and there is no separate assignment of error as to the sufficiency of the complaint, no question is presented for review as to the right of the plaintiff to recover against all the defendants.

From the Posey Common Pleas.

A. P. Hovey, G. V. Menzies, and E. D. Owen, for appellants.

J. Pitcher and H. C. Pitcher, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellants, the object of which was to ascertain and assert the rights of the appellee under a deed of trust, executed by Robert Dale Owen, Mary Jane, his wife, David Dale Owen, and Caroline C., his wife, Richard Owen, and Anne Eliza, his wife, and Robert H. Fauntleroy, and Jane Dale, his wife, parties of the first part, and John Cooper, William C. Pelham, and Elisha E. Morgan, trustees, of the second part, on the 18th day of November, 1844, the consideration for the conveyance moving or having moved from Robert Owen, the father of the grantors.

The deed conveys a large quantity of real estate, situated in Posey county, in this State, by its appropriate description, and the trust is declared as follows: "To have and to hold the said conveyed premises, with the appurtenances, unto the said parties of the second part and their heirs, and to their successors, if any such shall be appointed as hereinafter provided, as trustees, and in trust only, for the sole use, benefit, and behoof of the said Robert Owen, in his life rent, whom failing by death, for the joint and equal use, benefit, and behoof of the said Jane Dale, wife of the said Robert H. Fauntleroy, Mary Jane, wife of the said Robert Dale Owen, Caroline C., wife of the said David Dale Owen, and Anne Eliza, wife of the said Richard Owen, in life rent; and failing them, or any or either of them by death, or second marriage,

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as hereinafter mentioned, for the use, benefit, and behoof of their children respectively, as hereinafter mentioned, in fee simple, and forever."

The trustees are then authorized and directed to sell the lands and invest the proceeds at interest, payable semi-annually. The deed then proceeds thus: "But also declaring that the said trustees and their successors, if any, are to hold the said sums of principal and interest thus derived from the lands hereby conveyed, for the use, benefit, and behoof of the said Robert Owen, in life rent, for his use during his natural life, only paying to him, the said Robert Owen, or his order, the termly payments of interest aforesaid semi-annually during the term of his natural life; and at and after his death, for the life rent use of the said Jane Dale Fauntleroy, Mary Jane Owen, Caroline C. Owen, and Ann Eliza Owen, in equal portions, during their natural lives, or first, if any, widowhood; only paying to them, the said Jane Dale, Mary Jane, Caroline C., and Anne Eliza, or their several orders, one-fourth each of the termly payments of interest aforesaid semi-annually during their natural lives or widowhood, if any, aforesaid; and in the event of the death or second marriage of any of them, then for the use and behoof of the children of the same, in fee and forever; the children to inherit and receive the mother's equal share at her death, or at her second marriage; and further declaring that the lands hereby conveyed, and the proceeds thereof when sold, shall not be subject to the *jus marite* of them, the said Robert H. Fauntleroy, Robert Dale Owen, David Dale Owen, or Richard Owen, or any of them, nor to their right of administration; nor be subject to nor be liable for their debts or deeds, but shall be applied, after payment of reasonable expenses of the sale of the lands aforesaid and the other expenses of the trusteeship, solely and exclusively, first, for the life rent use of the said Robert Owen, as aforesaid, and failing him by death, then for the life rent use of the said Jane Dale, Mary Jane, Caroline C., and Anne Eliza, in equal portions, as aforesaid; and failing them, or any of them by death or

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second marriage, as aforesaid, for the use and behoof of their children as aforesaid, in fee and forever."

Provision is made for the appointment of new trustees by the grantees, in the event that it shall become necessary.

Provision is also made for the collection and application of the rents of unsold lands, by the trustees, etc.

The complaint is in two paragraphs, each of which was held good on demurrer thereto, alleging that it did not state facts sufficient to constitute a cause of action. The rulings of the court upon these demurrs are the alleged errors. There is a statement of a third error, that is, the rendition of judgment against the defendants.

In the first paragraph of the complaint, the execution of the trust deed is alleged, and that a copy of it is filed with and made part of the complaint; that two of the trustees, Pelham and Morgan, were dead, and that Cooper, the other, had resigned; that James Sampson and Richard S. Hornbrook were appointed trustees in manner and form as provided in said deed, and took upon themselves the duties of said trust and have continued to act as such to the present time; that since the execution of said deed Jane Dale and her husband, Robert H. Fauntleroy, have both died, and that said Jane Dale left surviving her her children, Constance, since intermarried with James Runcie, Ella Davidson, intermarried with George Davidson, and Arthur Fauntleroy; that David Dale Owen has died. It is then alleged that at the November term, 1869, of the Posey Common Pleas, Robert Dale Owen, Mary Jane Owen, and her children, Julian Dale, Rosamond Dale, and Ernest Dale Owen, Caroline C. Owen and her children, Alfred D. Owen, Anna M. Scheldt, William H. Owen, and Nena Dale Owen, Anne Eliza Owen, and her children, Eugene F. and Horace P. Owen, filed their petition and complaint *ex parte* in said court, praying the said court to order and decree a distribution of the personal property of the said trust estate among the children of Mary Jane, Caroline C., and Anne Eliza Owen, to wit, naming them as above.

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It is further alleged that on the hearing of said petition the trustees James Sampson and Richard S. Hornbrook, were, by said court, ordered to pay to the children of the said Mary J., Caroline C., and Anne Eliza all the personal property of said trust estate, amounting to a large sum, to wit, thirty-eight thousand six hundred and forty-three dollars and ninety cents, being the proceeds from sales of lands and interest thereon, in accordance with the terms of said deed of trust; that said trustees Sampson and Hornbrook afterward, in pursuance of the order of said court so made, paid to Julian D., Rosamond D., and Ernest D. Owen, children of Mary Jane Owen, twelve thousand eight hundred and eighty-one dollars and thirty cents, to Alfred D. Owen, Anna M. Scheldt, William H. Owen, and Nena Dale Park, formerly Owen, children of Caroline C. Owen, the same amount, and to Eugene F. and Horace P. Owen, children of Anne Eliza Owen, the same amount; that since said decree Nena Dale Owen, one of said parties, has intermarried with one Charles A. Park, and that Mary Jane Owen, another of the parties to said suit, had died, leaving surviving her her children above named, and her grandchild, Robert Cooper, the plaintiff herein, who is the son of Florence Cooper, formerly Owen, who was the daughter of said Mary Jane Owen, and whose death occurred previously to that of the said Mary Jane Owen. He alleges that he was not a party to the said suit for partition and distribution, nor was he served with a summons nor notified in other lawful manner of the pendency of said suit; and further says that he is interested in the said distribution and partition as one of the beneficiaries, for whose use and benefit said deed of trust was made and executed; and that upon the death of his grandmother, the said Mary Jane Owen, he was entitled to take and receive the share of the said trust estate to which his mother, Florence Cooper, would have been entitled had she been living; and plaintiff further says, that at the date of the execution of said deed Robert Owen, Mary Jane Owen, and Florence Cooper were in being, and that the said Florence Cooper died intestate previous to the death-

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of said Mary Jane, her mother, leaving surviving her as her only heir at law the said Robert Cooper, plaintiff herein; and he further says that no administration has ever been granted upon the estate of the said Florence Cooper, and that there are no debts owing by said estate. Prayer that the order and decree of said court of common pleas may be in all things revoked and set aside, and the proceedings opened and reviewed, and for all other proper relief.

The second paragraph of the complaint alleges the same facts substantially, and also that the judgment of the common pleas was wrongfully and fraudulently procured. Reference is made to the proceedings in the common pleas, and a copy of the deed of trust is made part of this paragraph. It alleges that Robert Owen, Jane D. Fauntleroy, and Mary Jane Owen are dead, but does not state when or in what order of time they died, nor whether they died before or after the judgment in the common pleas.

This paragraph concludes with a prayer that the order of the common pleas may be set aside and vacated, and asks judgment against James Sampson, Richard S. Hornbrook, Robert Dale Owen, Julian D. Owen, Rosamond D. Owen, Ernest D. Owen, Caroline C. Owen, Alfred D. Owen, Anna M. Scheldt, William H. Owen, Nena D. Park, Ann Eliza Owen, Eugene F. Owen, and Horace P. Owen, for the sum of five thousand dollars, and for other proper relief.

Upon overruling the demurrer, the defendants declined to make any further defence, and judgment was rendered, vacating and setting aside the order and decree of the common pleas, and for three thousand six hundred and eighty-seven dollars and twenty-five cents, against James Sampson, Richard S. Hornbrook, Robert Dale Owen, Julia D. Owen, Rosamond D. Owen, Ernest D. Owen, Caroline C. Owen, Alfred D. Owen, Anna M' Scheldt, William A. Owen, Nena D. Park, Anne Eliza Owen, Eugene F. Owen, and Horace P. Owen.

As we understand the paragraphs of the complaint, both
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of them seek to review and set aside the proceeding in the common pleas, by which the trustees were directed to pay over to the persons therein named the estate which was in their hands. The first paragraph of the complaint asks no other specific relief. To the first paragraph there seems to us to be several valid and fatal objections:

1. The plaintiff in this action was not a party to the action or proceeding, the judgment in which he seeks to review, nor is he, as to the estate in question, an heir, devisee, or personal representative of a deceased party. He does not claim as an heir, devisee, or personal representative of his grandmother, Mary Jane Owen, who was a party to the suit, but had a life estate only. But on the contrary, he claims that by the terms of the deed of trust his mother, Florence Cooper, took a vested remainder, which he inherited at her decease. He was not a party to the suit, nor was his mother.

One not a party to a judgment, and not claiming as heir, devisee, or personal representative of a deceased party, or otherwise in privity, cannot be affected by the judgment; and for this reason, it is a rule, that he cannot sustain a complaint to review the judgment. The rule is, that "any person who is a party to any judgment, or the heirs, devisees or personal representatives of a deceased party, may file in the court where such judgment is rendered, a complaint," etc. 2 G. & H. 279, sec. 586; *Cassel v. Case*, 14 Ind. 393.

2. The paragraph does not bring or profess to bring before the court a record of the proceedings and judgment sought to be reviewed. This is essential to the sufficiency of such a complaint. *McDade v. McDade*, 29 Ind. 340.

3. It does not appear from this paragraph of the complaint that Robert Owen, the party who, under the deed of trust, took the first life estate, was dead at the time of filing the complaint or commencing the action in this case. Until after his death, by the express terms of the trust, neither the four females named, nor their children, could take any interest under the deed, or maintain any action therefor.

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For these reasons, we must regard the first paragraph of the complaint as clearly bad.

What we have said of the first paragraph of the complaint may be said also of the second paragraph, so far as it is to be regarded as a complaint to review the judgment of the common pleas. The mere reference in this paragraph to the record of the proceeding in the common pleas is insufficient. If the court could be supposed to know what is contained in its records, or could examine the same, this court cannot do so. A copy of the proceedings and judgment should have accompanied the complaint, to comply with the rule in question.

But we have concluded that as the second paragraph is based upon the deed of trust, and prays for judgment for an amount in money, as well as for a review of the judgment of the common pleas, and as the appellee is not bound by the judgment, it may be sustained as a complaint for the recovery of money, although it is defective as a complaint to review the judgment.

The demurrer to this paragraph of the complaint is by all the defendants jointly, and hence we need not inquire whether or not a cause of action is shown against all the defendants. The rule is, that where two or more unite in demurring to a pleading, the demurrer must be well taken as to all of them, or it must be overruled as to all. If there is a cause of action shown against any of the defendants, the demurrer was correctly overruled.

The trustees, as well as the parties to whom the trust funds were paid by order of the common pleas, are made parties to the suit, and, as we understand the complaint, some other parties also. Assuming, then, that the proper parties are before the court, we shall proceed to examine and decide the main question discussed by counsel.

By the trust deed, a life estate in the use is given to Robert Owen, remainder for life to the four females named, with remainder in fee to their children, the children of each taking the share of their mother. There is no question as to

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the effect of a second marriage of Mary Jane Owen, wife of Robert Dale Owen, she being dead and her husband still living, and there being no pretence that there was any second marriage.

The first position of counsel for the appellants is, that the word "children," in that part of the deed which limits the remainder in fee, is to be understood as a word of limitation, and that the fee simple vested in the four females taking the second life estate in the use. We do not think this is the proper construction of the instrument. In the *habendum et tenendum* clause of the deed, it is said: "And failing them, or any or either of them, by death or second marriage, as hereinafter mentioned, for the use, benefit, and behoof of their children respectively, as hereinafter mentioned, in fee simple and forever." This language describes the manner of holding the lands conveyed, and the interests therein. The part of the deed referring to the uses in the proceeds of the land when sold, so far as the children are concerned, is as follows: "And in the event of the death or second marriage of any of them, for the use and behoof of the children of the same in fee forever, the children to inherit and receive their mother's equal share at her death, or at her second marriage." We do not think the word "inherit" used here can change the evident meaning and intention of the other words. It was used for the purpose of indicating the intention that the children of each of the women named should receive one-fourth of the estate, or in other words, that they should take by families, and not as individuals. The word "children" is not a word of limitation, but is a word of purchase. *Sorden v. Gatewood*, 1 Ind. 107; *Doe v. Jackman*, 5 Ind. 283; *Andrews v. Spurlin*, 35 Ind. 262.

The case is not brought within the rule in Shelley's case by the use of the word "children" to designate the persons who are to take the remainder.

Again, counsel for the appellants say:

"We see that in the deed under consideration the lands

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are to be sold before the children can take anything. The complaint leaves us entirely without *data* upon which to rest any knowledge of the time when the land was converted into such shape as could go to the children. Now, if the intermediate estate had closed before the land was sold, there was no capacity then to take. Until the intervening circumstance in the nature of a precedent condition had occurred, until the property was in such shape as had been granted to the children, it could not vest. This not having been done in the lifetime of Florence Cooper, there was then no such property. Nothing can vest that has no existence."

We think it a mistake to suppose that no interest in the lands vested in the children of the four women who took the second life use. The use or estate in the lands, as well as in their proceeds, is clearly declared by the deed in favor of the children. But the complaint shows that the lands have been converted into money, and this fact would seem to render any further discussion of this point unnecessary, if under other circumstances there was anything in it.

Again, counsel say:

"It is said, Rev. Stat. 1843, p. 425, sec. 61, that 'a remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation, and shall have the same effect as such a limitation would have by law.'

"There is a 'contingency, which, in case it should happen, would operate to abridge,' and 'determine the precedent estate,' namely, the second marriage of Mary Jane Owen and the others. The effect of the deed is, that the remainder shall go to the children after the life estate of Mary Jane Owen and the others, but if they marry a second time it shall then 'terminate' their life estate, and the remainder shall go over. We have then a conditional limitation. A conditional limitation is not a vested remainder."

The remainder in this case is not limited on a contingency which operates or could operate to abridge or destroy the

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particular estate. The contingency spoken of is in the particular estate, and not the remainder. The particular estate preceding the final remainder is, by its express terms, to continue only for the life or widowhood of the takers, and it cannot be said that a remainder which is to take effect in possession or use on the death or marriage of them or one or more of them operates to abridge or destroy the particular or precedent estate. The instance given by Kent in illustration of the rule contended for by counsel is this: "If there be a lease to A. for life, and if B. do a certain act, that the estate of A. shall then cease, and the remainder immediately vest in C., it is clear that the remainder will be void in that case." But if the position of counsel was correct, we do not see how it could benefit him in this case. The rule for which he contends applied to common law conveyances and followed from the maxim that none but the grantor and his heirs shall take advantage of a condition. But limitations in wills and in conveyances to uses, on such conditions, are good, as conditional limitations, or future or shifting uses, or executory devises; and upon the breach of the condition, the first estate, *ipso facto*, determines without entry, and the limitation over commences in possession. 4 Kent Com. 249, star paging; Rev. Stat. 1843, p. 425, sec. 61.

It is alleged in the second paragraph of the complaint, "that at the date of the execution of said deed, Robert Owen, Mary Jane Owen, and Florence Cooper were in being, and that the said Florence Cooper died intestate," etc. We regard the instrument in question as creating in Florence Cooper and the other children of Mary Jane Owen a vested remainder, to take effect in possession upon the death or second marriage of Mary Jane Owen. Counsel for appellant, after citing several authorities, comes to this conclusion, and insists upon it as the rule by which we should be governed in the decision of the case:

"It seems to us clear, both by the general rule of construction, and according to the intention of the grantors,

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that, by this deed, a remainder is left to a class of unascertained persons, vesting in the class, and at the time of distribution going to the class as it then exists. And upon this principle we think rests the true ground for decision in the case."

We do not think there is any good ground for the conclusion that only those children of Mary Jane Owen who were or are living at the time of distribution can participate in the fund or estate. An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seizin. A vested remainder is a fixed interest to take effect in possession after a particular estate is spent. 4 Kent Com. 202. The two events, either of which terminated the estate of Mary Jane Owen, that is, a second marriage or her death, must necessarily terminate her estate, at farthest, at the end of her natural life. Whenever that estate terminated, the estate in fee in remainder must take effect in possession and enjoyment. The estate in fee in remainder became vested at the execution of the deed, although its possession and enjoyment were postponed until the termination of the two successive life estates, that of Robert Owen and that of Mary Jane Owen. Florence Cooper, the mother of the appellee and child of Mary Jane Owen, having been in life at the date of the execution of the deed of trust, her death before the death of her mother did not have the effect to destroy or forfeit her estate, but, at her death, it descended to her son, Robert Cooper, the appellee. Robert Cooper, the appellee, does not take as a party to the deed of trust, as a child of Mary Jane Owen, and hence the question discussed by counsel, whether or not the word "children" used in the deed includes grandchildren or not, is foreign to the case. Robert Cooper takes by descent from his mother, Florence, and she took, with the other children of Mary Jane Owen, as a party to the deed of trust. A remainder may be created in personal property as well as in real estate, whatever may once have been the rule on that subject. 2 Kent Com. 352, star paging; 2 Bl. Com. 398.

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Lastly, it is urged that the judgment is against parties not liable according to the facts shown in the complaint. It is said :

" Personal judgment is given against the distributees of the several branches of the family, for the amount adjudged by the court. The shares of all but the children of Mary Jane Owen would be just the amount they now are if the appellee had been let in in the original distribution. If any one has his money, it is Julian Dale, Rosamond Dale, and Ernest Dale Owen ; it is out of their shares his must come, if from any persons. The rest are all entitled to what they received, whatever may be the rights of the appellee."

There was no separate demurrer to the complaint by any of the defendants, as we have seen, but only a joint demurrer by all of them. There is no separate assignment of errors by any of them. They are all in the same vessel and must sink or float together. There was no answer by any one of them, no trial, no motion for a new trial, nor was the question in any way presented to the common pleas, whether they were all liable or not.

A joint demurrer by several parties to a pleading which is good as to some of them, but not as to all, should be overruled. A demurrer bad as to a part of those filing it must, as a general rule, be held bad as to all of them. *Estep v. Burke*, 19 Ind. 87 ; *Teter v. Hinders*, 19 Ind. 93 ; *Skeen v. Muir*, 34 Ind. 310 ; *The Cincinnati, etc., Railroad Co. v. Paskins*, 36 Ind. 380.

It is probably true that the children of Mary Jane Owen have received more than their share of the trust funds, in consequence of the exclusion of the appellee from any participation therein, but we can decide nothing on the point, for the reason stated.

That part of the judgment setting aside and overruling the judgment of the common pleas is reversed, and that part of it for the recovery of the sum of money mentioned is affirmed. Let each party pay one-half of the costs.

MURPHY v. WILSON ET AL.

CONTEMPT.—Power of Justice of the Peace.—Juror.—A justice of the peace has power to attach and punish as for a contempt jurors who, after being sent out to consult upon a verdict, escape and go away without leave of the justice, before returning a verdict.

SAME.—When a jury is sent out by a justice of the peace to consult upon their verdict, the justice must determine when they have consulted together for a reasonable time; the jury cannot determine this for themselves, and separate without leave of the justice.

SAME.—If jurors do thus separate without leave of the justice, no affidavit of the fact need be filed to authorize the justice to issue an attachment against the jurors for the same.

SAME.—It is not a valid excuse for such jurors that they were hungry, or that the place assigned them for their deliberations was not comfortable or well adapted to the purpose.

SAME.—Sufficiency of Writ.—A writ of attachment in such case, reciting the names of the jurors, and alleging their escape without leave of the justice, and ordering their arrest to answer for the alleged contempt, is substantially correct, and is sufficient to authorize the arrest of the parties.

PRACTICE.—Reasons for New Trial.—Assigning as a cause, in a motion for a new trial, the refusal of the court to admit certain evidence "as shown in the bill of exceptions," when at the time of the motion there is no bill of exceptions, is insufficient.

From the Henry Circuit Court.

J. Brown and J. M. Brown, for appellant.

DOWNEY, J.—This was an action by the appellant against the appellees, commenced before a justice of the peace, appealed to the common pleas, and by the abolition of that court tried in the circuit court. It appears that Murphy was a juror, empanelled with others to try a cause before Wilson, who was a justice of the peace. After the jury had been sent out to deliberate, in about an hour and a half or two hours, they called the constable having them in charge, and gave him "a verdict to disagree" which they had made out. He went away, and after about fifteen minutes came back and said the justice of the peace refused to accept it, etc. They remained about an hour and a half longer, and then sent for the justice and asked to be released. This he refused. They told him they would release themselves; and

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in about half an hour afterward they left their room and went away without permission, and without having made a verdict. On the next day, the justice of the peace issued an attachment against them for contempt, in thus leaving his court without his permission and against his orders. Young, the other defendant, was the constable, and he executed the process, arrested the plaintiff Murphy, and took him before the justice of the peace.

For these acts, the justice and the constable were sued in this action. Both before the justice of the peace and in the circuit court, there was a finding and judgment for the defendants.

In the circuit court, there was a motion by the plaintiff for a new trial, which was overruled by the court, and final judgment was rendered for the defendants.

The overruling of the motion for a new trial is the only error properly assigned.

The first reason for a new trial is, that the decision of the court is contrary to law. Nothing is urged under this reason.

The second reason stated is, that the decision of the court is not sustained by sufficient evidence. This ground is not well taken. A justice of the peace must be held to have power to attach and punish, as for a contempt, a juror thus conducting himself.

The statute provides, that "whenever a jury after having consulted together for a reasonable time, shall report to the justice that they cannot agree, he shall discharge them," etc. 2 G. & H. 591, sec. 54. It cannot be allowed that jurors, under such circumstances, may judge for themselves when they have "consulted together for a reasonable time." This must be decided by the justice of the peace. By leaving the court of the justice, under the circumstances, the appellant was guilty of a contempt, and was liable to attachment.

It is claimed that the attachment could not legally issue without an affidavit. But we do not think so. The justice had placed the jury in charge of the constable, and he had a right to expect that they would remain there until they

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agreed upon a verdict, or were discharged by him. When they left his court in violation of their duty and of his orders, he needed no affidavit of the fact to justify him in issuing the attachment. When the attachment was returned, if there was any reason why the juror should not be punished, it might then be shown. We do not regard the contempt in this case as a constructive contempt, as defined in *Whittem v. The State*, 36 Ind. 196.

Counsel say the contempt, if one was committed, could not have been committed in the presence of the justice, as he had no right to be present in the jury room; and if a juror leaves the room, the justice cannot know it, unless some one shall inform him; and hence, it is urged, an affidavit was necessary. This reasoning is not satisfactory to us. The justice could know that the jury had dispersed without himself being in the jury room when they left. They could only leave after making a verdict, or by his permission, after deliberating for a reasonable time. He necessarily knew that they had separated, without the happening of either event.

It appears from the evidence that the jurors, when they asked to be discharged, told the justice that they were hungry, having had nothing to eat since morning, and it then being about five o'clock P. M.; that the room in which they were kept was cold and uncomfortable; and that the justice said he would keep them together forty-eight hours, if they did not sooner agree. Justices are not provided with offices at the public expense. Many of them do so little business that they cannot afford to have a regular office. They hold their courts in dwelling-houses, school-houses, shops, barns, and sometimes in the grove. We could not say that a juror might run away because the place assigned to the jury for their deliberations was not entirely comfortable or well adapted to the purpose.

It has been and yet is the policy of the law to keep jurors together, without meat or drink, water only excepted, while they are deliberating. The fact that they became hungry is

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no reason why they should disperse without permission of the court.

But it is urged that the attachment issued was illegal and void. It is as follows :

"HENRY COUNTY, SPICELAND TOWNSHIP.

"*Before W. R. Wilson, J. P. Spiceland Township:*

"The State of Indiana, to any constable of Spiceland township: Whereas it appears to the satisfaction of the undersigned, a justice of the peace of said township, that James Steel, Jonathan Murphy, Edwin Murphy, Frank Winslow, F. M. Rhodes, Chris. Hough, and Hugh Murphy, did, in direct disobedience to the command of the undersigned justice, and in an unlawful manner, forcibly retire from the room in which they were confined, without being discharged by said justice; you are therefore hereby commanded to attach the bodies of said James Steel," etc., "and bring them forthwith before me, to answer to their alleged contempt in so disobeying as aforesaid; and of this attachment make legal service and return.

"Given under my hand and seal, this 17th day of January, 1873. Wm. R. WILSON, J. P." (SEAL.)

This writ was introduced, without objection by the plaintiff, as a part of his evidence. It might have stated more fully the cause of its issuing, but we regard it as substantially correct. The reason for their arrest was stated to be a contempt of the authority of the court, and for that they were to answer. The cause of action, as stated in the complaint, is the arrest of the plaintiff, unlawfully and with force and arms, and conveying him, from, etc., without any legal writ, the plaintiff not then and there being guilty of any crime whatever, and detaining him for forty-eight hours, and causing him to lay out and expend ten dollars. The legal authority to make the arrest is the only question in the case, according to the complaint. This we think existed.

There are other reasons stated in the motion why a new trial should have been granted.

The third and fourth are the refusal of the court to admit certain evidence, as shown in the bill of exceptions. A reason

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for a new trial which is thus made to depend upon the bill of exceptions, which had not yet been made, cannot be held sufficient.

The judgment is affirmed, with costs.

STEVENS *v.* THE BOARD OF COMMISSIONERS OF HARRISON COUNTY.

CORONER.—*Justice of the Peace.*—When the coroner is absent from the county, or unable to attend, a justice of the peace may hold an inquest, and, in doing so, has all the power and can perform all the duties pertaining to the office of coroner.

SAME.—*Post Mortem Examination.—Physician.*—When a justice of the peace, acting as coroner, requests a physician to make an examination of the body over which an inquest is being held, and he makes an examination, and the justice so certifies to the county commissioners, the physician will be entitled to an allowance.

From the Harrison Circuit Court.

A. Stephens, for appellant.

W. N. Tracewell and F. W. Mathis, for appellee.

DOWNEY, J.—The appellant filed the following account before the board of commissioners:

"HARRISON COUNTY, IND.,

"To Thomas J. Stevens, M. D., Dr.

"For *post mortem* examination on the body of Barney O'Brien, fifty dollars (\$50).

"THOMAS J. STEVENS, M. D."

The commissioners allowed ten dollars of the account, and refused to allow the residue. Stevens, M. D., then appealed to the circuit court, where, upon a trial by the court, no part of his claim was allowed. He moved the court for a new trial, which was refused, and judgment for costs rendered against him.

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The only error assigned in this court is the refusal of the circuit court to grant a new trial. The reasons for a new trial are, that the evidence was not sufficient to sustain the finding of the court, and that the finding was contrary to law.

The statute provides that when a surgeon or physician is required to attend an inquest held by a coroner, and make a *post mortem* examination, the coroner shall certify such service to the board of county commissioners, who shall order the same paid out of the county treasury. 2 G. & H. 17, sec. 8. The inquest in this case was held by a justice of the peace, and he certified for Stevens that on the 19th day of March, 1872, he was a justice of the peace, and acted as coroner, the regular coroner being at the time twenty miles from him, and not being present; that as such acting coroner he employed Dr. Thomas J. Stevens, of, etc., to make the *post mortem* examination; that said Stevens did make a *post mortem* examination, by his direction, of the dead body of said O'Brien, as was requested by the jury, and was not assisted by any other physician or physicians. Stevens states, in his evidence, that he made the examination; says he was at the place where the dead body was; that the coroner was absent, and Bowman, a justice of the peace, held the inquest; that he went to the place where the body was, prepared to make the examination, had all the necessary instruments except a saw, which he could have got at a farm-house; found several wounds on the head, made apparently with the poll of an ax, several small wounds on the scalp, on the front part of the head, etc.; that the coroner employed him to make a *post mortem* examination. He ran his fingers around the edge of the large wound and probed it, and thinks he removed some of the membranes with a scalpel. He insisted upon opening the skull to learn the extent of the wound and cause of the death—so told the jury. The father of the deceased objected to such an examination, and the jury said it was not necessary. The coroner refused to have it done. His services were worth fifty dollars. He was not summoned

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as a witness; was told the squire wanted him to be present, and he went; Bowman told him he had intended to summon him. Bowman told him to make a *post mortem* examination; he did not volunteer to make it; considers he made a *post mortem* examination; made it as thorough as he could with finger and probe, etc.

Bowman testified that at the date named he was a justice of the peace, etc.; in the absence of the coroner, he acted as coroner, and held the inquest; when he got to the place he met Dr. Stevens; before he got there, he intended to send for him; did not send for him, nor request any one to do so; asked the plaintiff to look at the wounds on the head of the deceased; he did so, and made some examination of the wounds by using his finger and a probe; the plaintiff was anxious to make a *post mortem* examination; the father would not allow it; the jury said it was not necessary; it was clear what caused his death; he gave the certificate which was read in evidence; he forbid Stevens going any further than he went.

One of the jurors testified that he did not desire the plaintiff to open the skull, and that he thought the plaintiff was excited, or that something was the matter with him.

A witness testified as a physician that unless some of the cavities were opened, it was not a *post mortem* examination.

This was the substance of the evidence, except such as related to the value of the services rendered, which ranged from fifteen to fifty dollars.

The statute is, that in every case where the coroner shall be absent from the county, or unable to attend, any justice of the peace of the proper county may hold an inquest over a dead body, etc. 2 G. & H. 18, sec. 16. The third section of an act passed in 1853, Acts 1853, p. 26, provides that justices of the peace shall have all the powers, perform all the duties, and be governed in all respects by that and every other act regulating the duties and compensation of coroners in regard to holding inquests. According to this act, the justice of the peace had power to act as coroner whether the

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coroner was in the county or not. The evidence shows that the justice requested the doctor to make an examination, and that he did make some kind of a *post mortem* examination. The justice so certified to the county commissioners. We think the doctor was entitled to an allowance of some amount. It is not for us to decide how much.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

46	544
125	364
46	544
128	515
46	544
157	190

BEARSS ET AL. v. MONTGOMERY, GUARDIAN.

PLEADING.—*Complaint by Guardian.*—When the guardian of an insane person sues in his own name, the complaint should show that the right of action is in the insane person, and should not allege the cause of action to be in the guardian.

SAME.—*Reply.—Departure.*—When the guardian of an insane person sues upon a promissory note, and alleges in the complaint that the note was indorsed to the plaintiff, a reply showing that the note was indorsed to the deceased ancestor of his ward, and that his ward's only claim to the note grows out of a division made by the heirs of the notes held by the deceased, is a departure.

PRACTICE.—*Demurrer for Departure.*—A departure in pleading may be objected to by a demurser.

ADMINISTRATOR.—*Possession of Assets.*—An administrator has a claim superior to that of the heirs to the assets of the estate, until the debts of the estate have been paid.

From the Miami Circuit Court.

A. J. Davidson and J. R. Parmlee, for appellants.

H. I. Shirk and F. Mitchell, for appellee.

DOWNEY, J.—This action was by the appellee against the appellants. The title of the action is as follows: "Levi M. Montgomery, guardian of Francis M. Watts, insane heir of Barnett Watts, deceased, plaintiff, *v.* William E. Bearss, Omar D. Bearss, Oliver J. Bearss, and George R. Bearss." It then proceeds thus:

"Said plaintiff complains of said defendants, and says said defendants, on the 15th day of January, 1869, by their promissory note, the original of which is filed herewith, promised to pay Charles Pefferman four hundred and fifty-five dollars; that said Charles Pefferman indorsed the same to the plaintiff in writing; the original indorsement is herewith set out; that on the 16th day of September, 1869, said defendants made a payment on said note of thirty-eight dollars and thirty-eight cents, which amount is duly credited on said note; that said note is due, and that the remainder thereof is wholly unpaid; wherefore," etc.

The first paragraph of the answer was by all the defendants, and in it they averred that the plaintiff was not the real party in interest in said suit; that the note was made payable to Charles Pefferman, the payee named therein, and was by said Pefferman sold and delivered to one Barnett Watts; that afterward, in 1869, said Watts died intestate, the owner and in possession of said note; that afterward, to wit, on the 17th day of December, 1869, letters of administration were duly granted upon the estate of said deceased by the court of common pleas of the county of Fulton to the defendant, George R. Bearss, who gave bond, etc., and who is still the administrator of said estate; that said estate has not yet been settled, nor have the debts against said estate, or the expenses of administration, or court and other costs in relation thereto been paid by said administrator, or in any other manner howsoever; and the defendants aver that said administrator has no means whatever with which to pay said indebtedness or said costs and expenses, or any part thereof, nor has any property or assets belonging to said estate ever come to his hands as such administrator, with which to pay the same or any part thereof. They aver that there are claims against said estate unpaid, some of which are filed in said Fulton Common Pleas, and some of which are not yet filed, amounting to a considerable sum, but what amount they can not state; that said administrator has notified these defendants,

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who are principals in said note, and the said George R. Bearss, surety thereon, not to pay said note to the plaintiff, but to pay the same to him, as the proceeds thereof are necessary to pay said debts, etc., and that said note belongs to him as such administrator; wherefore, etc.

George R. Bearss answered further and separately, setting up the same facts, in substance, as are averred in the first paragraph.

Both of the paragraphs were sworn to by George R. Bearss, and were accompanied by a copy of the letters of administration.

The plaintiff replied in three paragraphs. The first was a general denial. The second was pleaded to the first paragraph of the answer; and the third was to the second paragraph of the answer pleaded by George E. Bearss alone.

The defendants demurred jointly to the second and third paragraphs of the reply, which demurrer the court sustained as to the second paragraph and overruled as to the third.

A trial by the court resulted in a finding for the plaintiff. A motion made for a new trial by the defendants was overruled, and there was final judgment for the plaintiff.

Two errors are assigned. 1. Overruling the demurrer to the third paragraph of the reply. 2. Refusing to grant a new trial.

The third paragraph of the reply avers that George R. Bearss is one of the joint makers of said note; that he, for the sole purpose of hindering and delaying the collection of said note, and with the intent to deprive said plaintiff's ward of the use of the money owed by him and the other defendants, caused letters of administration to issue on the estate of said Barnett Watts to him on the 18th day of December, 1869; that the said Bearss has taken no steps in the administration of said estate, filed no inventory, and no report, except an informal one; that the said Bearss, at the time of causing said letters of administration to issue to him, well knew there were no debts against said estate, and that a division of the personal assets, by a mutual agreement

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between the heirs of said Barnett Watts, deceased, had been made among said heirs, each one, of whom there were three, taking an equal third thereof; that the personal assets of said estate consisted of two notes of equal amount given by one Charles Pefferman to said deceased, and the note in suit; that the notes were of equal value; that the note sued on had been given by the defendants herein to one Charles Pefferman, who assigned it to said deceased in his lifetime; that in said division of said personal estate of said deceased, the note of the defendants, on which the suit is brought, fell to the ward of plaintiff as her distributive share of said personal estate; that said defendant George R. Bearss well knew, before he took out letters of administration as aforesaid, that said note had become the property of the ward of the plaintiff by said distribution; and, although over two years have passed, said defendant has never demanded or made any claim whatever for said note of the plaintiff or his ward; that the only debt against said decedent at his death was the funeral expenses, amounting to twenty dollars, which has been fully paid by said heirs, each one paying one-third thereof; that there are no other debts against said estate, either on file in the common pleas of Fulton county or elsewhere; that said George R. Bearss has not been to any expense or labor in the settlement of said estate, and is of no kindred to said decedent or his heirs; nor was he, at the time of obtaining said letters of administration, a creditor of said estate, but obtained the granting of said letters without the knowledge or consent of said plaintiff's ward; wherefore, etc.

Counsel for appellants insist, in the first place, that the reply in question is a departure from the complaint, for the reason that the complaint counts upon a cause of action due to the plaintiff in his own right, while the reply sets up a right of action in favor of the ward of the plaintiff. In the body of the complaint, the plaintiff does not allege that the note was indorsed to his ward, but alleges "that said Charles Pefferman indorsed the same to the plaintiff, in writing; the

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original indorsement is herewith set out." The only indorsement on the note is the name of Charles Pefferman.

In actions at law by a committee or guardian of a lunatic, at common law, the action was properly brought in the name of the lunatic as plaintiff, and a next friend was appointed for him, who might be his committee or some other person. In suits in chancery, the practice was for the lunatic and his committee or next friend to unite in the action. Our code provides that it shall not be necessary to make an idiot or lunatic a joint party with his guardian or committee, except as may be required by statute. 2 G. & H. 37, sec. 4. When the committee or guardian sues in his own name, the complaint should show that the right of action is in the lunatic, and should not allege the cause of action to be in the guardian or committee. In this case, the guardian is made plaintiff, and it is expressly averred that the note was indorsed to him; not that the note was indorsed to the lunatic. So far as we can see from an examination of the complaint, the plaintiff need not have styled himself guardian; for as the note is alleged to have been indorsed to him, the right of action upon it was in him.

In the reply, he shows that the note, instead of having been indorsed to him, as stated in the complaint, was indorsed to the deceased ancestor of his ward, and that his ward's only claim to it grew out of a division of the notes held by the deceased, made by the heirs after his death. It seems to us that the plaintiff has shifted his ground, and is guilty of a departure from the complaint. The objection may be taken by demurrer, as was done in this case. *McAroy v. Wright*, 25 Ind. 22.

Another objection to the reply urged by counsel for the appellants is, that from the facts alleged the right of action on the note was in the administrator of the deceased indorsee, and not in the plaintiff or his ward. The answer alleges that there were debts, expenses of administration, etc., to be paid by the administrator. The reply avers that there was a certain amount due for funeral expenses, and that that amount

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was paid by the heirs in equal parts. But when this payment was made does not appear, nor does it appear that the expenses of administration had been paid. The administrator has a superior claim to that of the heirs to the assets of the estate until the debts, etc., of the estate have been paid. Counsel for appellee refer us to *Martin v. Reed*, 30 Ind. 218. But it is not in point. There was no question in that case between the personal representative and the heirs of the deceased. The question was, whether the heir or his assignee could sue on the note, and it was held that he could. It is said in the case, in speaking of the note:

"If it descended to them subject only to the payment of the debts of the intestate, they were entitled to its possession, subject only to the rights of the personal representative. If the intestate owed no one, which is highly probable from the facts shown by the complaint, then, if her heirs could agree amongst themselves upon a distribution of her property, there was no absolute necessity for the appointment of a personal representative. Under such circumstances, no good reason is perceived why the heir entitled to it might not enforce the payment of the claim in equity."

It is clear that the case does not meet the question under consideration. Here it is alleged there were debts and expenses, and the question is between the administrator and the heir; there were no debts, and the question did not arise between the administrator and the heir, but between the assignee of the heir and the debtor.

We need not consider the question relating to the motion for a new trial.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the third paragraph of the reply.

The City of Logansport *et al.* v. Puterbaugh.

THE CITY OF LOGANSPORT ET AL. v. PUTERBAUGH.

CITY.—Street Improvement.—Notice.—Notice of letting a contract for a street improvement must be given for a reasonable length of time.

SAME.—What is not Reasonable Time.—Publishing notice in a weekly paper for the first time on the 27th day of May, and posting notices on the 27th and 28th days of May, that proposals will be received until the 4th day of June for the construction of an expensive street improvement, is not a reasonable length of time for such notice.

From the Cass Circuit Court.

M. Winfield, for appellants.

S. T. McConnell, D. Turpie, and H. D. Pierce, for appellee.

DOWNEY, J.—This was a complaint by Puterbaugh against the city of Logansport, the members of the city council by their individual names, the city civil engineer, and the contractor, praying for a temporary injunction against the construction of a sidewalk in front of the plaintiff's property, and for a perpetual injunction on the final hearing.

Various objections are urged in the complaint against the regularity of the proceedings resulting in the contract for the improvement, and among them it is alleged that notice as required by law for proposals to do the work was not given; that no printed or written notices were properly and legally posted in the city, nor was any publication made in a newspaper in the city as required by law.

Upon the complaint, verified by the affidavit of the appellee, a restraining order was granted, until a day in the succeeding term, at which time, after hearing the parties, a temporary injunction was granted, to continue until the final hearing of the cause. An exception was taken to the order of the court granting the temporary injunction, the evidence was put in the record by a bill of exceptions, and an appeal was taken to this court. It is here assigned as error that the temporary injunction was improperly granted.

The statute on the subject simply provides, that "the common council may cause the same to be done, by contracts given to the best bidder, after advertising to receive propo-

The City of Logansport *et al. v.* Puterbaugh.

sals therefor." 3 Ind. Stat. 98, sec. 68. It is to be regretted that some definite and reasonable time is not fixed by law, during which the notice shall be given. It would relieve the courts from the embarrassing questions which arise relative to the time of notice.

In *Moberry v. The City of Jeffersonville*, 38 Ind. 198, it was said, that the statute, while it requires notice to be given, does not specify the length of time during which it shall be given, nor the manner of giving it, and that perhaps a reasonable time would be implied. But in that case, it did not appear that any notice had been either posted or published. In this case, by the notice, proposals were to be received until June 4th, 1873, at 2 o'clock P. M. The evidence is, that the notice was published two weeks in a newspaper in the city, but the days of publication are not stated. The notice bears date the 27th of May, and the two insertions of the notice must have been within eight days. It also appears that there were one hundred copies of the notice, printed in large type, posted up in conspicuous places, in the city, a part of them on the 27th, and the residue on the 28th day of May, 1873. There is nothing in the ordinances of the city, which were introduced in evidence, fixing the time or manner of the notice. It is evident that in this case the last insertion of the notice in the newspaper must have been on the day of the letting, or the day preceding it, and consequently must have been almost or quite useless. From the advertisement and the contract which are in the record, it may be inferred that the work to be done, including the property of others as well as that of the plaintiff, was such as to make competition very desirable to those who had to pay for the improvements. There was but a single bidder for the work, and the contract was awarded to him at his bid. The sidewalks were to be made of "split Berea stone of the best quality, evenly dressed, with straight edges and square corners, to be laid the entire width of the respective sidewalks of said streets, with alternate seams as shown in front of Doland's opera house, on a prepared bed of sand

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eight inches in depth." The work was important and expensive, involving the labor and expense of obtaining the material from a distant point. The learned judge, who granted the temporary injunction in the circuit court, was of the opinion that the notice was not a reasonable one, under the circumstances, and, as counsel for the appellant state, granted the injunction on this ground. It is very important to property owners that notice for a reasonable time shall be given before a contract for an improvement so expensive shall be made. It is only by this means that competition can be incited, and contracts let at a reasonable price. Any disregard of this requirement is almost certain to result in favoritism and injustice. The courts cannot fix a time of notice, but can only decide cases as they may be presented, acting upon the rule intimated in *Moberry v. The City of Jeffersonville, supra*, that notice for a reasonable time must be given. In our opinion, we should not disturb the judgment or order of the circuit court made in this case.

The judgment is affirmed, with costs.

46	553
127	103
46	552
108	538

THE TOWN OF LIGONIER v. ACKERMAN.

TOWN.—License to Sell Intoxicating Liquor.—Where a town in good faith adopted an ordinance requiring a license to be obtained for the retail of intoxicating liquors, in pursuance of the amendatory act of the legislature, of the 11th of March, 1867 (Acts 1867, p. 220), a person who applied for license, and received and paid for the same without objection, cannot recover back the money thus paid, although the act of the legislature, and the ordinances of the town thereunder, are invalid.

PAYMENT.—Illegal Demand.—If an individual pays an illegal demand made against him, without legal compulsion, with a full knowledge of the facts and without fraud or imposition, he cannot reclaim it.

SAME.—A mere apprehension of legal proceedings is not sufficient to make a payment compulsory; and where there is a threatened prosecution, the payment must be made under protest, in order to entitle the party to reclaim it.

The Town of Ligonier *v.* Ackerman.

From the Noble Circuit Court.

J. H. Baker, J. A. S. Mitchell, and J. E. Knisely, for appellant.

W. A. Woods and R. M. Johnson, for appellee.

BUSKIRK, J.—On the 11th day of March, 1867, an amendatory act was passed by the legislature, and approved by the Governor of the State of Indiana, which provided, among other things, that incorporated towns should have the power to license, regulate, and restrain the sale of spirituous liquors. The act also provided, that, in cases where such licenses were granted, a sum not exceeding double the amount required by the statute of the State might be required to be paid into the treasury of the corporation by the person so licensed, before receiving such license.

As the statute of the State required a license of fifty dollars to be paid into the county treasury, it is evident by this act it was intended to delegate to incorporated towns the right to require a license fee of not to exceed one hundred dollars from each person who should engage in the business of retailing intoxicating liquors within the corporate limits of such town.

The appellant, a duly incorporated town, proceeded by its board of trustees to pass an ordinance, which was to be in force from and after the 1st day of July, 1867, by which she undertook to "regulate and restrain" the sale of intoxicating liquor by forbidding its sale by any person within her corporate limits in a less quantity than a quart, unless they should first give notice, by posting written notices, ten days, in five public places, of their intention to make application for license. The ordinance further provided, that upon satisfactory proof of notice, and upon the applicant's giving satisfactory security to the town that he would keep an orderly and peaceable house, the board of trustees should grant him a license. Before the license was delivered to the applicant, it was required that he should pay to the treasurer of the town the sum of one hundred dollars as a license

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fee. It was further provided, that if any person, not being licensed according to the provisions of the ordinance, should sell any intoxicating liquors in a less quantity than a quart at a time, or should sell any intoxicating liquors to be drank on the premises, such persons should, upon conviction, be fined in the sum of one hundred dollars, and that all fines and penalties for the violation of the ordinance should be recovered as provided by law in such cases.

A second ordinance was passed by the appellant's board of trustees, which was to take effect on and after the 15th day of October, 1867. The second ordinance was substantially the same as the first, except that it required twenty days' publication of notice, and provided that a license might be granted for any period not less than six months, nor more than one year. In all other respects, the two ordinances are almost identical.

On the 27th day of November, 1868, a third ordinance was passed, not in any manner affecting the previous ordinances, further than that all licenses should thereafter expire on the first days of January and July of each year.

The foregoing is a brief summary of all the legislation on the subject pertinent to the case, as it remained apparently in force from the date of the passage of the amendatory act first referred to until the November term, 1870, of this court, when it was held, that by reason of the failure to set out the whole of the amended section in the act as amended, the whole amendment was void, and as a consequence all ordinances which were passed under it were void also. *Town of Martinsville v. Frieze*, 33 Ind. 507.

This decision was promulgated at the November term, 1870, and two and a half years after that time, the appellee, by his attorneys, addressed a communication to the appellant's board of trustees, advising them that several years prior to that time he had paid into the treasury of the town of Ligonier three hundred and four dollars and seventeen cents for licenses to sell intoxicating liquors, and further informing them that he had paid the same under protest, and

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to avoid arrest, fine, and imprisonment ; and after communicating to the board of trustees that the ordinances under which the money was paid were null and void, he demanded that the money should be paid back with interest. This demand having been made on the 28th, and the town failing to respond satisfactorily, this suit was instituted on the 29th day of April, 1873, for the purpose of recovering the money alleged to have been paid, with interest. -

The complaint is in two paragraphs, both of which are substantially the same. The one seems to be based on the ordinance which went into force July 1st, 1867, and the other upon the ordinance of October 15th, 1867.

It is averred in the complaint that at the times above named the ordinances, the substance of which has been heretofore given, were passed by the appellant's board of trustees ; that at the time of the passage of the ordinances, the appellee was engaged in the sale of intoxicating liquors in a less quantity than a quart, in the town of Ligonier, holding a license from the Board of Commissioners of Noble County ; that he was desirous of continuing his business, and that for the purpose of avoiding the penalties and forfeitures provided in said ordinances, and to save himself from arrest and imprisonment he was compelled to pay, and did pay to the treasurer of said town, large sums of money for licenses. It then proceeds to charge that the ordinances were adopted and enforced by the appellant, and that the money was extorted from the appellee, without authority of law ; that the appellant's officers unlawfully and wrongfully exacted and extorted said moneys from the appellee, and forced and compelled him to pay the same, to avoid arrest, fine, and imprisonment, and refused to permit him to pursue his business of dealing in intoxicating liquors until he paid said money ; that he paid the same by compulsion of said authorities, and to avoid arrest, fine, and imprisonment at the hands of appellants, and that he had demanded repayment of the money.

No question was made as to the sufficiency of the complaint.

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The appellant answered in three paragraphs. The substance of the first paragraph, after admitting the passage and publication of the ordinance, is,

1. A denial that the appellee paid at the time and in the manner averred.

2. That the appellant acted in good faith, and under competent advice, in the adoption of the ordinance.

3. That after the ordinances were adopted, the appellee, of his own volition, from time to time presented his application for license in accordance with the regulations prescribed in the ordinance, and that such applications were at his request granted.

4. That the licenses were issued to him at his own request, and were received by him, and the price stipulated therefor paid by him without any objection or protest, and without any notice that he intended to question the appellant's right to pass the said ordinance and receive the said moneys for such licenses.

5. That at the time of making the applications, and granting the licenses, both parties acted under the belief that the ordinance was legally passed.

6. A denial on the part of the appellant that she extorted any money from the appellee, or that he paid the money to avoid arrest, fine, and imprisonment.

The second paragraph contains substantially the same averments, viz., the good faith of the appellant in the passage and publication of the ordinance; that the appellee applied for licenses from time to time; that at his request licenses were issued to him; that he paid for the same without any objection whatever, and under the belief that the town had the legal right and authority to pass the ordinance and receive the money for licenses; that the money was paid without notice or protest, etc., with the following additional averments: first, that the appellant used no threats, coercion, or compulsion of any kind whatever, to induce the appellee to apply for and pay for such licenses, other than the passage and publication of the ordinance; and, lastly,

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that the money received for licenses has been expended for the common benefit of the citizens of the town, including the appellee.

The third paragraph avers the good faith of the town, and that the appellee, with a large number of other persons, were at the time of the adoption of the ordinance, and have been ever since, engaged, at various public places within the corporate limits of said town, in the business of keeping drinking saloons and tippling houses, their chief business being the sale of intoxicating liquors to be drank as a beverage on their premises; that as a result of their business, which afforded large gains to the persons engaged in it, the appellant was compelled, at great expense, to employ a marshal and policemen to preserve the peace and quiet of the town, and protect the persons and property of her citizens from the violence and riotous conduct of persons who were accustomed to assemble at, and who became intoxicated with liquors procured from, the saloon of the appellee and the others in like manner engaged; that in order to furnish herself with the means necessary to employ marshals and policemen, so as to accomplish the purposes above mentioned, she did, in good faith, pass the ordinance referred to; that after the ordinance was passed, the appellee made application from time to time for license to sell intoxicating liquors within the corporation; that at his request licenses were issued to him, which he received and paid for without objection, believing that the appellant had the right and authority to pass the ordinance and receive the money, and without any notice that he intended to sue to recover the same; that the town used no threats, coercion, or compulsion of any kind whatever, in order to induce the appellee to apply for and pay for such licenses, other than the passage and publication of said ordinance; and that the moneys paid for licenses have been expended in paying for marshals and policemen, who were required to preserve the peace and quiet of the town.

The foregoing abstract of the answer contains the sub-

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stance of the material portions of it; there being other averments in it, however, which in their connections are quite material.

The court sustained a demurrer to each paragraph of the answer, on the ground that neither of them stated facts sufficient to constitute a defence to the appellee's claim, and this ruling of the court is the first error assigned, and constitutes the important question in the case.

The ultimate fact to be reached in the case is the state of mind under which the payments were made. If they were made voluntarily, with a full knowledge of all the facts and without fraud or imposition, they are beyond reclamation. If, on the other hand, the money was extorted from the appellee, by so operating upon him as that he was put under duress of person or goods, or if fraud or imposition was practised upon him, he is entitled to receive his money back, for the plain reason that the payment was involuntary.

The demurrer to the first paragraph admitted the truth of the following averments: That the appellee did not pay in the manner alleged in his complaint; that the town did not act wantonly or recklessly, but in good faith, in the adoption of the ordinance, and that it was passed under apparent authority; that the appellee, in pursuance of the regulations in the ordinance prescribed, made application from time to time for license, which at his request was issued to him, and which he received and paid for without any objection whatever; and that both parties acted in good faith, under the belief that the ordinance was legally passed. It is also admitted that the money was not extorted from him, or paid to avoid arrest, fine, and imprisonment, unless the naked fact of the adoption of the ordinance had that effect.

From these admissions, it follows, that unless it can be maintained that the mere adoption and publication of the ordinance will be conclusively presumed to have so constrained the will of the appellee as that his acts were not the voluntary result of his judgment, the ruling of the court below cannot be sustained.

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It is a well established rule of law, that if an individual pays an illegal demand, made against him, without legal compulsion, with a full knowledge of the facts, and without any fraud or imposition, he cannot reclaim it. This proposition is so universally conceded, and will be found so often reiterated in the cases, that a citation of authorities cannot be necessary.

From the averments admitted by the demurrer to the answer, it cannot be pretended that there was any mistake of the facts. The facts pertinent to the subject were the passage of an amendatory act by the legislature, the adoption of the ordinance by the town, which required certain things of all persons who desired to continue or engage in the business of retailing liquors in Ligonier, and the further fact that the appellee was then engaged in the business. These facts were as well known to the one party as the other. With a full knowledge of all the facts, without any fraud or imposition, and with a settled conviction in his mind that the law under which he acted was valid, he applied for his licenses, received them, paid for them, without question or objection, and exercised his privilege of selling under them.

It cannot be maintained, either on reason or authority,) that an individual who pays a demand, with a full knowledge) of all the facts, in the belief that it is a legal duty for him to do so, pays it involuntarily. Nor will an individual be heard to say that he was coerced to do that which he believed the law required of him. The law will presume that every citizen freely and voluntarily discharges every duty which he believes it imposes upon him, and, when it is admitted that there was no fraud, no personal exaction, nothing but the passage and publication of the ordinance—which was done in good faith, and which both parties recognized as valid—then it follows as a conclusion of law that the payment was voluntary.

It is an elementary doctrine of the law, that a citizen will be presumed to perform what it requires of him from the

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sentiment that it "is nothing more than what every good man ought both to promise and perform," and because "there is a moral obligation resting upon every individual to obey the laws of the country in which he lives." Sharswood's Blackstone, vol. 1, p. 58, note 15.

In the case of the *Town Council of Cahaba v. Burnett*, 34 Ala. 400, the learned judge says: "The ordinances do not appear to have been adopted otherwise than in the fullest confidence of their validity, and it is most probable that the plaintiff's proposal to pay the prescribed sum was under a conviction of legal duty." In the case at bar, the foregoing propositions are not left to mere inference or supposition, for it is expressly admitted that the ordinance was adopted in good faith, and that when the applications were made, and the licenses issued and paid for, both parties acted under the conviction that it was legal and valid.

The case under discussion, then, is much more favorable for the appellant than the case above referred to, for the reason, that in that case, it will be observed, the learned judge considered it mainly upon the theory that the party paid his money under the probable belief that the ordinance was invalid, but constrained to do so by the penalties contained in it. In this case, however, the appellee was fully convinced of the validity of the ordinance; and having that conviction in his mind, it cannot be supposed that he contemplated the infliction of the penalties of the ordinance against one who acquiesced in its validity, and would therefore from a conviction of duty anticipate its requirements. WALKER, C. J., maintained the doctrine in the case above cited, that notwithstanding a person may believe the law which requires of him the payment of a license invalid and oppressive, still, if he pays the demand without any other compulsion than the mere existence of the law which requires it, rather than submit his liability to the arbitrament of the courts, he could not afterward say that he paid under compulsion. The reasoning of the learned judge in the case referred to is exhaustive, and, in our judgment, conclusive.

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of this case. See, also, *Mayor, etc., of Richmond v. Judah, 5 Leigh, 305.*

If, then, the opinion of the court in 34 Ala., *supra*, holding that a payment, made under the belief that it is demanded contrary to law, and under the apprehension of legal proceedings, is not of itself compulsory, is sound, how can the ruling of the court below be maintained, which holds in effect that, notwithstanding the appellee actually believed the ordinance valid, and therefore could have had no thought or apprehension of legal proceedings, yet a payment made in compliance with it was under legal compulsion?

If the appellee believed the ordinance valid, he recognized it as imposing on him a just obligation, and concurring in the wholesome doctrine of the law, that every one is under a moral obligation to comply with the law of the community in which he lives, he made his application, received his licenses, paid the price stipulated, under a conviction of legal duty, freely, and with an unconstrained will. When, therefore, the premise is admitted that the appellee believed the ordinance to be a valid enactment, the conclusion unavoidably follows that he did not pay under an apprehension of legal proceedings, but from a conviction of legal duty.

The appellee and the town were of the same opinion on the subject of the validity of the ordinance, both recognizing it as binding. In that belief, the appellee published his notice, advising his townsmen that at a certain time he would apply for license. In that belief, he appeared before the board of trustees and convinced them of his fitness, and requested them to issue to him a license. In that belief, when his fitness was determined, he filed his bond, and paid for his license. As a matter of course, there could be no protest, no notice of duress, for the reason that no duress existed. He was acting from a different impulse. He was not pricked by the fear of penalties, but impelled by a sense of duty. He did not regard the ordinance as an illegal contrivance to extort money from him, but he looked upon it as a valid

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enactment, which imposed a just obligation upon him, and thus recognizing it he made his application, received and paid for his licenses, and enjoyed the monopoly which they afforded him and the protection which the town was enabled by means of the money thus paid to give him.

But let us suppose that the money was not paid from a sense of legal duty, but from an apprehension of the consequences which might result to him from the passage and publication of the ordinance; would this render the payment compulsory, there being no threats of a prosecution, no personal execution, or other act of coercion on the part of the appellant, and no duress of person or property, and no objection or protest on the part of the appellant?

affilee / It is well settled that the mere existence of the ordinance would not render the payment compulsory. The money must have been exacted by the *appellee* under a threat of prosecution, and the money must have been unwillingly paid, and under protest. It is settled by the following authorities, that a mere apprehension of legal proceedings is not sufficient to make a payment compulsory, and that where there is a threatened prosecution, the payment must be made under protest: *Harvey v. The Town of Olney*, 42 Ill. 336; *Elston v. The City of Chicago*, 40 Ill. 514; *Town Council of Cahaba v. Burnett*, 34 Ala. 400; *Mayor, etc., of Baltimore v. Lefferman*, 4 Gill, 425; *Mays v. The City of Cincinnati*, 1 Ohio St. 268; *Baker v. The City of Cincinnati*, 11 Ohio St. 534; *Taylor v. The Board of Health*, 31 Penn. St. 73; *Borough of Allentown v. Saeger*, 20 Penn. St. 421; *Cook v. City of Boston*, 9 Allen, 393; *Jenks v. Lima Township*, 17 Ind. 326, and cases there cited.

"No one can be heard to say, that he had the right and the law with him, but he feared his adversary would carry him into court, and that he would be unlawfully fined and imprisoned; and that being thereby deprived of his free-will, he yielded to the wrong, and the courts must assist him to a reclamation." *Town Council of Cahaba v. Burnett*, 34 Ala. 400.

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In Maryland, there was an act of the legislature, and an ordinance of the city of Baltimore, passed under it, requiring persons owning certain lands bounded by Jones' Falls to build walls around them on the side next the falls, and prescribing a penalty for the failure to build the walls. An owner of land, under the constraint of the ordinance, having paid the price of building the wall, sued to recover it back. The Maryland court of appeals held that the action could not be maintained. The court, in delivering its judgment, used the following emphatic language: "We consider the doctrine established, that a payment is not to be regarded as compulsory, unless made to emancipate the person or property, from an actual and existing duress. And that a payment made under a distress warrant is not compulsory." *Mayor, etc., of Baltimore v. Lefferman*, 4 Gill, 425. See, also, *Morris v. Mayor etc., of Baltimore*, 5 Gill, 244.

In South Carolina, a case similar in principle to this arose, in which an effort was made to recover money paid to procure a license under an ordinance afterwards held unconstitutional, and the court sustained the principle here contended for. *Robinson v. The City Council of Charleston*, 2 Rich. 317. See, also, *Smith v. Hutchinson*, 8 Rich. 260; *Phillips v. Jefferson Co.*, 5 Kansas, 412; *Smith v. Schroeder*, 15 Minnesota, 35.

The case in 42 Ill., *supra*, involved precisely the same principle as in the present case. Notwithstanding the extraordinary character of the ordinance, and that, as the learned judge observed, there was no pretence of authority for its passage, and notwithstanding the parties protested against the payment, and gave notice that they intended to sue to recover it, and that they paid under duress, still, the learned judge in delivering the judgment of the court says: "We remark in conclusion, that we do not express any opinion on the question as to whether this was a voluntary or compulsory payment. If the money was paid under threats of prosecution, or under a belief, induced by the officers of the town, that only by payment could they escape prosecution,

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and was paid by them under protest, such a payment would not be voluntary." The court said that the question, whether the payment was voluntary or compulsory, should have been left to the jury, and that it was because it was not fairly put to the jury that the decision of the court below was reversed. The court did not undertake to modify or disturb the doctrine of the law upon this subject in that state, but cited approvingly the case of *Elston v. The City of Chicago*, 40 Ill. 514.

In *Elston v. The City of Chicago*, *supra*, the court say: "We find, then, there was a regular judgment against this property, and that the plaintiffs owning it, voluntarily, and not under process, by one of the parties in interest, paid this money, and we know of no principle of law that can be invoked in their favor, to compel the city to pay it back to them. Although the judgment maybe void, still the payments made by the plaintiffs were voluntary; they were made with a full knowledge of all the facts and circumstances of the case; in ignorance only of their legal rights, without fraud, imposition, or any undue advantage taken of them, and really, for an object they had originated, and the accomplishment of which has benefited their estate. No case can be found, where money has been voluntarily paid, with a full knowledge of the facts and circumstances under which it was demanded, which holds that it can be recovered back, upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party paying. And it is invariably held, that a payment is not to be regarded as compulsory, unless made to relieve the person or property from an actual and existing duress imposed upon him by the party to whom the money is paid, and such is the tenor of all the cases cited by appellants from *Valpy v. Manley*, 50 Eng. C. L. 602, to *Lazell v. Miller*, 15 Mass. 207. No well considered case, anywhere, has proceeded upon different principles."

In the case of *Borough of Allentown v. Saeger*,²⁰ Penn. St. 421, the same principle was maintained, the court

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saying: "It was submission to legitimate authority which was *prima facie* right in its exercise."

In the case of *Taylor v. The Board of Health*, 31 Penn. St. 73, the court, speaking of this subject, used the following language: "The threat that is supposed to underlie such demands is a legally harmless one; that, in case of refusal, the appropriate legal remedies will be resorted to."

These two cases establish the doctrine in Pennsylvania, that an individual may not pay money silently, and in submission to apparent legal authority, and then stand by until the money has been expended for the common benefit, and still maintain an action to recover it, even though he was not liable originally to pay.

METCALF, J., in delivering the judgment of the Supreme Court of Massachusetts, says: "It is an established rule of law, that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he can not recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust." *Benson v. Monroe*, 7 Cush. 125; *Forbes v. Appleton*, 5 Cush. 115; *Preston v. The City of Boston*, 12 Pick. 7, 14.

In the last of the above cases, it is said: "Threat of legal process is not such duress, for the party may make proof and show that he is not liable;" and in *Forbes v. Appleton, supra*, DEWEY, J., says: "A threatened lawsuit is not that species of duress, which will authorize the party to recover back money voluntarily paid on an illegal claim."

It was held by this court in *Jenks v. Lima Township*, 17 Ind. 326, that "an illegal tax, voluntarily paid, can not be recovered back; and the payment is regarded as voluntary, unless it be made to procure the release of person or property from the power of the officer; and protest, at the time of payment, in connection with other circumstances, may be evidence that the payment is made for that purpose."

Counsel for appellee have cited a large number of cases as

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supporting their position that the payment in question was compulsory. A brief review of the cases cited will be made.

In *Foyner v. The Inhabitants, etc.*, 3 *Cush.* 567, it was held that payment to a collector of taxes, who has a tax bill and warrant for levying the same, in the form prescribed by law, is not a voluntary, but a compulsory payment; and if the tax so paid be illegally assessed, it may be recovered back by action.

In *Preston v. The City of Boston*, 12 *Pick.* 7, it was held that if a person pays an illegal tax, in order to prevent the issuing of a warrant of distress, with which he is threatened, and which must issue, of course, unless the tax is paid, the payment is to be deemed compulsory, and not voluntary.

In *Steele v. Williams*, 8 *Exchequer*, 624, the payment was held compulsory, because the parish clerk required the plaintiff to pay an illegal fee for examining the record book of burials and baptisms. The court held that the money was illegally demanded, *colore officii*, and that the payment, under the illegal demand, was necessary to the exercise of a legal right, and therefore involuntary.

The case of *Morgan v. Palmer*, 2 *B. & C.* 729, was an action to recover back money illegally demanded by the mayor of a city as a fee for issuing a license to keep a hotel. The ground upon which the ruling of the court proceeded will appear from the following extract from the opinion of the court: "It has been well argued that the payment having been voluntary, it can not be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'that which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing. Such was the situation of the parties to this action. The case is therefore very different from *Brisbane v. Dacres*, 5 *Taunton*, 144, and our judgment must be in favor of the plaintiff."

The Duke De Cadaval v. Collins, 4 *A. & E.* 858, was an

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action to recover back money which had been paid by the plaintiff to obtain his discharge from an illegal, malicious, and fraudulent arrest. The court held that the plaintiff was entitled to recover, because the money had been extorted under color of office, as a condition to his discharge from an illegal arrest, which had been made for the purpose of extortion.

The case of *Maxwell v. Griswold*, 10 How. 242, was an action to recover back money, which had been illegally demanded by the collector of New York as a condition on which he would deliver to the plaintiff his property.

The case was fully reviewed by this court in *The Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312. The ruling in that case was placed upon the ground of moral duress. The court say: "The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

The court further said: "Now, it can hardly be meant in this class of cases, that to make a payment involuntary, it should be by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment."

The ruling in the case of *The Town of Princeton v. Vierling*, 40 Ind. 340, was based upon the averments in the complaint which were substantially the same as in the present case, which is conceded to be good. This court say: "The complaint is in six paragraphs, and each alleges that the money was extorted from the plaintiff by the officers of the town, and that he paid the same to avoid arrest, fine, and imprisonment," etc. Upon the averments of the complaint, there can be no room to doubt the correctness of the ruling in that case.

The case of *Harvey v. The Town of Olney*, 42 Ill. 336,

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was an action to recover back money which had been paid by the plaintiffs, as they alleged, under compulsion, to avoid prosecution under an ordinance which required the payment of six hundred dollars by any person exercising the business of a substitute broker or recruiting agent in said town. The court say:

"The first of these instructions was wrong, because if the money was illegally extorted from the appellants by threats of prosecution, or under circumstances which justified them in believing that their only mode of escaping prosecution was by the payment of the money, and they paid it under protest, and with notice that they would bring suit to recover it, and if the town treasurer received it under these circumstances in his official capacity, and acting under said ordinance, then the payment to him was a payment to the corporation, and it was wholly immaterial whether the ordinance had been posted ten days or not."

It was further held that it was no defence to such an action for a town to plead the illegality of its own ordinance; and it is sufficient, if it appear, that the money was paid to avoid fine and imprisonment, and under circumstances sufficient to induce the belief that the provisions of the ordinance would be enforced.

The court further said: "We remark in conclusion, that we do not express any opinion on the question as to whether this was a voluntary or compulsory payment. That question is for the jury, and we reverse the judgment because it was not fairly left to them by the instructions. If the money was paid by the appellants under threats of prosecution, or under a belief, induced by the officers of the town, that only by payment could they escape prosecution, and was paid by them under protest, then such payment can in no just sense be called voluntary. *The County of La Salle v. Simmons*, 5 Gilman, 515. Such a state of facts would make this case very unlike the case of *Robinson v. The City Council of Charlestown*, 2 Rich. 317, cited by counsel for appellees, and the case of *Elston v.*

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The City of Chicago, 40 Ill. 514, in both of which the payment was purely voluntary."

The case of *Parker v. The Great Western R. W. Co.*, 7 Manning & G. 253, was an action to recover money which had been illegally exacted as a condition of carrying certain packages. The ground of the ruling will sufficiently appear from the following extract from the opinion of the court:

"We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them ; and for the refusal to do which, an action on the case might have been maintained, as was expressly decided in the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399. And, in this respect, the case very much resembles that of — v. *Pigott*, mentioned by Lord KENYON, in *Cartwright v. Rowley*, 2 Esp. N. P. C. 723. That was an action brought to recover back money paid to the steward of a manor, for producing at a trial some deeds and court rolls, for which he had charged extravagantly. The objection was taken that the money had been voluntarily paid, and so could not be recovered back again ; but, it appearing that the party could not do without the deeds, so that the money was paid through necessity, and the urgency of the case, it was held to be recoverable. We think the principle upon which that decision proceeded is a sound one, and strictly applicable in the present case, and that the defendants cannot, by the assistance of that rule of law on which they relied, retain the money that they have improperly received."

Waterhouse v. Keen, 10 Eng. Com. Law, 310, was an action to recover money, which it was alleged had been illegally exacted by a turnpike company. The court held, that the money was legally exacted and received, and hence the case has no bearing on the present case.

In *Valpy v. Manley*, 50 Eng. Com. Law, 592, the sheriff had made an illegal levy of an execution upon the goods of the plaintiff, and was threatening to sell them, and to avoid the sale and regain the possession of his goods, he paid the

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amount demanded, and then brought his action to recover the money. The court held the levy illegal, and the payment involuntary. The court say: "All the cases show, that, where a party is in, claiming under legal process, the owner of the goods contending that the possession is illegal, and paying money to avert the evil and inconvenience of a sale, may recover it back in an action for money had and received, if the claim turns out to have been unfounded."

The case of *The County of La Salle v. Simmons*, 5 Gilman, 513, is relied upon. There, the board of commissioners were authorized, in establishing a ferry, to receive as a donation from the person to whom the license was granted, the sum of one hundred dollars; but the commissioners demanded of Simmons the sum of five hundred dollars, which he paid under protest, for the purpose of receiving a license, and then sued to recover back the money. The court say: "The money was unlawfully and wrongfully obtained, and cannot in equity and good conscience be retained by the county. The fact that the commissioners chose to call it a donation does not change the real character of the transaction. It was merely a device to obtain money which the county had not the slightest right to demand. The money was exacted from the plaintiff under circumstances that strip the transaction of all the features of a voluntary payment. It was in law and fact a compulsory payment, as much so as the payment of usurious interest, which the lender exacts from the borrower; or the payment of illegal charges, which an officer demands as the condition of the performance of official services."

Again, it is said: "There was a great inequality of condition between the parties. The plaintiff was in the power of the commissioners, and compelled from the necessity of the case to advance the money in order to obtain the license. He was not *particeps criminis*, because acting under restraint and not from choice. *Faques v. Withey*, 1 H. Black. 65; *Browning v. Morris*, 2 Cowp. 790; *Williams v. Hadley*, 8 East, 378; *Faques v. Golightly*, 2 W. Black. 1073; *Mount*

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v. *Waite*, 7 Johns. 434; 1 Story Eq., sec. 300, *et seq.*; *Ferguson v. Sutphen*, 3 Gilman, 547."

In *Ford v. Holden*, 39 N. H. 143, the payment was held to be compulsory, because the selectmen of the town had demanded the payment of illegal taxes as the condition upon which his name was to be placed upon the list of voters. It was held to be extortion.

Pratt v. Vizard, 27 Eng. Com. Law, 198, was an action to recover from an attorney money he had required the plaintiff to pay as the condition on which he would deliver to the plaintiff his title deeds. The court held that the defendant had no claim against plaintiff for services, or lien on the deeds, and consequently that the money was extorted, and having been paid under protest and to regain the possession of his deeds which were wrongfully withheld, he could recover back the money.

The case of *Gibbon v. Gibbon*, 76 Eng. Com. Law, 205, was in principle the same as the last case cited. In this case, the defendant refused to deliver certain title deeds until a sum of money was paid. It was paid and recovered back in that action.

In *Ashmole v. Wainwright*, 2 Gale & D. 938, the defendants, common carriers, refused to redeliver plaintiff's goods, which they had carried for him, except on payment of five pounds and five shillings charges. The plaintiff insisted that he was not liable to pay anything; but, ultimately, defendants having said that they would take nothing less than the whole sum, he paid the whole sum to regain his goods, protesting that he was not liable to pay anything, and that if he was liable, the charge was exorbitant. The payment was held to be compulsory, and plaintiff recovered the amount in excess of the true charge.

Follett v. Hoppe, 57 Eng. Com. Law, 226, was an action by an assignee in bankruptcy, to recover from the sheriff a sum of money which the bankrupt had paid to obtain his release from imprisonment, upon the ground that the bankrupt was not subject to arrest and imprisonment upon the *ca. sc.* in the hands of the officer. The plaintiff recovered.

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Hills v. Street, 15 Eng. Com. Law, 358, was an action to recover money which plaintiff had paid to obtain the possession of his goods which had been illegally distrained for rent. The payment was held involuntary, and the plaintiff had judgment.

In *Unwin v. Leaper*, 39 Eng. Com. Law, 635, the plaintiff sought to recover back money which he had paid under coercion and to avoid a threatened penal action. The court held the payment illegal and compulsory.

The object of the action in *Oates v. Hudson*, 6 Exchequer, 346, was to recover money which had been paid to obtain the possession of title deeds, and the plaintiff recovered.

It was held in *Shaw v. Woodcock*, 14 Eng. Com. Law, 14, that a payment, made in order to obtain possession of goods or property to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory, and not a voluntary payment, and may be recovered back.

In *Dew v. Parsons*, 18 Eng. Com. Law, 87, the question was whether the defendant, in an action brought by the sheriff to recover certain fees, was entitled to set off the payment of illegal and extortionable fees in another action, and it was held that as the fees had been paid under duress and to avoid arrest and imprisonment, the set-off would lie.

In *Payne v. Chapman*, 31 Eng. Com. Law, 89, a certificated bankrupt, being arrested on a *ca. sa.* for a debt provable under the commission, paid the money under protest, stating his bankruptcy and certificate, and warning the sheriff that he would apply to the court to have the money paid back. It was held, that this was not such payment of money under legal process with knowledge of the facts, as precluded the bankrupt from recovering back the money.

In *Ripley v. Gelston*, 9 Johns. 201, where the collector refused to give a vessel a clearance unless the owner would pay tonnage duty, which was not properly chargeable, and the owner paid the money, the court sustained an action to recover it back.

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The case of *Cazenove v. Cutler*, 4 Met. 246, where the mortgagee, who was in possession for condition broken, required the mortgagor to pay more than was legally due in order to redeem, and it was paid to avoid a foreclosure, the court held the payment was compulsory and might be recovered back.

The case of *The Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312, is much relied upon by counsel for appellee. In that case, the money was paid by the plaintiff to obtain the possession of his cattle, which were held by the railroad company, and who refused to surrender them unless illegal and exorbitant charges were paid. The payment was made under protest, and upon an agreement by the parties that an action should be brought to recover back any sum which was paid in excess of the just and legal charges. The payment was held to be involuntary, because the company, having the possession of the plaintiff's cattle and refusing to deliver them unless the money demanded was paid, possessed an undue advantage of the plaintiff, and took advantage of his pressing necessities to coerce the payment of the money.

In the present case, there was no duress of the person or property of the appellee. There was no exaction or demand of payment other than that created by the existence of the ordinance. There was no threatened prosecution or civil action. There was no remonstrance on the part of the appellee against the illegality of the ordinance, or being forced to make the payment to avoid a greater evil; nor was the payment accompanied with a protest against the illegality of the course pursued toward him. Was there an undue advantage taken of the situation and necessities of the appellee? The solution of this question will depend much upon what would have been the consequences of his failure to obtain a license from the authorities of the town and his selling without a license.

Section 9 of the ordinance in question provided that if any person, not being licensed, should sell any intoxicating liquors, etc., he should be fined, etc.; and section 11 provided that all fines and penalties should be recovered as provided

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by law in such cases. Section 23 of the act "for the incorporation of towns and defining their powers," etc., provides that fines, penalties, and forfeitures may be recovered by action in the name of the corporation. It is very obvious from these provisions, that the rights of the appellee, neither as to his person nor property, could have been affected without a resort to legal process. He was neither arrested nor threatened with arrest. He could not have been imprisoned, unless he had failed, upon being arrested, to enter into recognizance for his appearance, or unless he was found guilty upon the trial of the cause. In such action, the appellee might have based his defence upon the invalidity of the ordinance or the unconstitutionality of the act authorizing the passage of such ordinance. Or he might have obtained an injunction, for it is well settled that where a municipal corporation is proceeding to enforce an invalid ordinance, from which loss or damage will result to an individual, an injunction will lie. *Dinwiddie v. The President, etc.*, 37 Ind. 66; *The Toledo, etc., R. R. Co. v. The City of Lafayette*, 22 Ind. 262; *Greencastle Township, etc., v. Black*, 5 Ind. 557; *The City of Lafayette v. Fenners*, 10 Ind. 70; *English v. Smock*, 34 Ind. 115; *Dillon Municipal Cor.*, sec. 728, *et seq.* The right to arrest, without process, for violating an ordinance of a city is fully discussed and decided in *Boaz v. Tate*, 43 Ind. 60.

Persons who have illegal taxes assessed against them may enjoin the same. If they fail to do so, and voluntarily pay them, their only remedy is an appeal to the law-making powers of the State. *Shoemaker v. The Board of Commissioners of Grant County*, 36 Ind. 176. See, also, *City of Evansville v. Pfisterer*, 34 Ind. 36; *The Town of Covington v. Nelson*, 35 Ind. 532.

If, then, after the passage of the ordinance, the parties had arrived at different conclusions as to its validity, neither one could have reached or affected the other without first appealing to the court; and wherever persons are in that situation, they are on an equal footing.

Where one person has in his own hands the property of

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another, which he refuses to surrender, except upon the condition of the payment of an illegal or exorbitant demand, it can be well said that he has an undue advantage. The possession of the property may be a matter of such moment to him that to await the law's delays would be ruinous ; but where an individual is in possession of his property, and another asserts the right to control his use of it, if that claim can only be enforced by legal proceedings, no case can be found which holds that the party may tamely surrender his right, with a full knowledge of all the facts, and without fraud or imposition, and then say that he was not on "equal footing" with the other.

It is very obvious that the appellant possessed no power to enforce her ordinance, except by proceedings in court, where the parties would stand upon equal footing, and the validity of the ordinance would be tested. The law is well and accurately stated in *The Boston, etc., Co. v. City of Boston*, 4 Met. 481, where it is said : "The legal principle relied upon, on this point, is this ; that if a party, with full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he can not afterward allege such payment to have been made by compulsion, and recover back the money, even though he should protest, at the time of such payment, that he was not legally bound to pay the same. The reason of the rule, and its propriety, are quite obvious, when applied to a case of payment upon a mere demand of money, unaccompanied with any power or authority to enforce such demand except by a suit at law. In such case, if the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment."

The above language is quoted with approval by this court in *Patterson v. Cox*, 25 Ind. 261, and in *The Lafayette, etc., R. R. Co. v. Pattison, supra*.

In the most of the cases cited by counsel for appellee, and

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which we have examined and reviewed, the money was paid under duress of person or property. Where the payment of money is made upon an illegal demand by one who has the power and authority to arrest and imprison the person, or to levy upon the property of the person upon whom the demand is made, and by sale satisfy such demand, the parties can not treat upon equal terms, and the party upon whom the demand is made is not bound to submit to arrest or the seizure of his property, and then seek his remedy for false imprisonment or trespass, but he may pay the illegal demand and then recover it back. And where money is paid upon an illegal demand, under a controlling necessity, such as to gain the possession of his property or to exercise the right to vote, or the like, the money may be recovered back, although the party knew at the time of the payment that the demand was unjust.

In all the foregoing cases, the person upon whom the illegal and unjust demand is made is bound to act promptly or suffer grievous wrong. He can not afford to wait the law's delay, and if he should not comply with a demand accompanied with the power and authority then and there to enforce it, the remedy given would not be adequate to compensate for the injury sustained. But such is not the present case. If the ordinance in question had been valid, as both the parties believed, then the money would have been lawfully paid upon a legal demand. If, however, the ordinance was invalid, as it was held to be, then the appellee, when sued for failure to comply with its provisions, could have defeated the action by showing the invalidity of the ordinance. There was no pressing and controlling necessity for prompt and immediate payment on the part of the appellee, for he could have waited the decision of the courts without sustaining loss or suffering inconvenience.

It being admitted by the demurrer to the answer, that the licenses were issued to the appellee at his own request, that they were paid for without objection, both parties believing that the ordinance was legal, the conclusion that irresistibly

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follows is, that the payment was made under a pure, unmixed mistake of law. The parties, with all the facts before them, sat in judgment upon the validity of the ordinance and the appellee's liability to pay. They came to the unanimous conclusion that the ordinance was good, and that the appellee was liable to pay for licenses; and having reached that conclusion, he paid his money, which was received by the town and expended for the common benefit of her citizens, and, as was said in the case of *Bond v. Coats*, 16 Ind. 202, the appellee "having constituted himself a judge in his own case, we are of opinion that the weight of authority is, that he can not be now heard to reverse his own judgment." See authorities cited in the opinion.

Or, in the language of TUCKER, J., in *Mayor, etc., of Richmond v. Judah*, 5 Leigh, 305, we say: "For he has undertaken to judge for himself. He has not thought it necessary to submit his rights to a judicial tribunal. He has settled his controversy with his adversary by his own act, and his adversary had a right to presume that that controversy was no longer open and unsettled. He had a right to presume that it was closed forever."

The money having been paid with a full knowledge of all the facts, and without fraud or imposition, and under a mistake of law, it can not be recovered. *Cummins v. White*, 4 Blackf. 356; *Downs v. Donnelly*, 5 Ind. 496; *Snelson v. The State, ex rel. Board of Commissioners of Madison County*, 16 Ind. 29; *Martin v. Stanfield*, 17 Ind. 336; *Jenks v. Lima Township*, 17 Ind. 326; *Elliott v. Swartwout*, 10 Peters, 137.

"One person is not allowed to alter the position of another, and affect his rights by assuming to understand his own legal duty, and pay a claim on the footing of such assumption, and then draw it in question upon the allegation of a mistake of his duty." *Ege v. Koontz*, 3 Penn. St. 109.

The appellee applied for a license, with a full knowledge of all the facts, got what he applied for, paid for it, and

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enjoyed it. As was said by BERRY, J., in pronouncing the opinion of the court in the case of *Smith v. Schroeder*, 15 Minn. 35 : "He pays of his own motion, voluntarily, and under no mistake of facts, to a person who exercises no compulsion over him or his property. The duress, or *quasi* duress, necessary to constitute an involuntary payment does not exist." See, also, a discussion of this subject, by KINGMAN, C. J., 5 Kansas, 412.

In our opinion, the court erred in sustaining the demurrer to the first and second paragraphs of the answer, and the ruling of the court was correct in sustaining the demurrer to the third paragraph of the answer.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the first and second paragraphs of the answer, and for further proceedings in accordance with this opinion.

PETTIT, J., dissenting.—This suit was brought by the appellee against the appellant, and the case made by the pleadings is this: The appellee was a dealer in and retailer of liquors in the town of Ligonier under and by virtue of a license from the board of commissioners of the county. While this state of facts existed, the town passed an ordinance forbidding such traffic and trade within its limits, without a town license, and the payment of one hundred dollars a year for the same; and fixing and imposing a penalty of one hundred dollars for each violation of the ordinance; and the statute, 1 G. & H. 631, sec. 57, provides for imprisonment till any fine imposed by an ordinance of a town shall be paid or replevied. The officers of the town were charged with the enforcement of the ordinance, and two dollars were allowed to the informer in every case when a conviction was had. With this ordinance, a public menace and threat to destroy his then legal business, or compel him to pay money or be imprisoned till he did pay or replevy his fines, he applied for, took, and paid for license under the

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ordinance. This was an overpowering advantage on the part of the town, and a sufficient duress of Ackerman to entitle him to recover back the money paid.

Subsequently, it was held by this court, 33 Ind. 507, that the act under which the town ordinance was passed was unconstitutional; and this suit was brought to recover the money paid for license under the ordinance, and the only question presented is, can money paid under this state of facts be recovered back? The court below held in the affirmative, and I fully approve of its action, and cite without quoting, *Steele v. Williams*, 8 Exch. 625; *Morgan v. Palmer*, 9 Eng. C. L. 232, cited in the brief of the appellee, as 317, 319, 320, and 321; Same Case, 2 Barn. & Cres. 729, and cases cited; *Preston v. The City of Boston*, 12 Pick. 7; *Joyner v. The Inhabitants of School District No. 3, etc.*, 3 Cush. 567; *The Town of Princeton v. Vierling*, 40 Ind. 340; *Duke de Cadaval v. Collins*, 4 A. & E. 858; *Maxwell v. Griswold*, 10 How. 242; *Harvey v. The Town of Olney*, 42 Ill. 336.

The above cases I have examined, and, in my opinion, they fully sustain the ruling of the court below.

I here insert a long list of authorities cited by the counsel for the appellee, but which I have not examined. They may be of interest to the bar in examining similar questions. *Parker v. The Great Western Railway Company*, 49 Eng. C. L. 253, 292; S. C., 7 Man. & G. 253, 293; *Close v. Phipps*, 49 Eng. C. L. 586; S. C., 7 Man. & G. 586; *Waterhouse v. Keen*, 10 Eng. C. L. 310; S. C., 4 B. & C. 200; *Valpy v. Manly*, 50 Eng. C. L. 594; *The County of La Salle v. Simmons*, 10 Gilman, 513; *Ford v. Holden*, 39 N. H. 143, 145, 146, 147, 148, 149; *Pratt v. Visard*, 27 Eng. C. L. 198; *Steele v. Williams*, 8 Exch. 625; *Gibbon v. Gibbon*, 76 E. C. L. 205, 213; *Ashmole v. Wainwright*, 42 Eng. C. L. 938; S. C., 2 Q. B. 837; *Follett v. Hoppe*, 57 Eng. C. L. 225; S. C., 5 C. B. 226; *Hills v. Street*, 15 Eng. C. L. 358; S. C., 5 Bingham, 37; *Unwin v. Leaper*, 39 Eng. C. L. 635; S. C., 1 Man. & G. 747; *Oates v. Hudson*, 6 Exch. 346; *Ripley v. Gelston*, 9 Johnson, 201; *Clinton v. Strong*, 9 John-

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son, 370, 375; *The Boston and Sandwich Glass Company v. City of Boston*, 4 Met. 181, 187, 188, 189; *Chase v. Dwinel*, 7 Greenl. 134; *Snowdon v. Davis*, 1 Taunton, 359; *Shaw v. Woodcock*, 14 Eng. C. L. 14; S. C., 7 B. & C. 73; *Hearsey v. Pruyn*, 7 Johns. 179; *Dew v. Parsons*, 18 Eng. C. L. 87; S. C., 1 Chit. 295; *Payne v. Chapman*, 31 Eng. C. L. 89; S. C., 4 A. & E. 364; *Cadaval v. Collins*, 31 Eng. C. L. 206; S. C., 4 A. & E. 858; *Bates v. The New York Insurance Co.*, 3 Johnson Cases, 238, 240; *Marriott v. Brune*, 9 How. 619; *Atwell v. Zeluff*, 26 Mich. 118.

I think the judgment should be affirmed.

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MCILWAINE, TRUSTEE OF WASHINGTON TOWNSHIP, NEWTON COUNTY, v. ADAMS ET AL.

APPEAL.—Assignment of Errors.—Title of Action.—Township Trustee.—In an action against a township trustee, upon a note executed by him as township trustee, a judgment was rendered against the township. Upon appeal to the Supreme Court, the entitling of the cause in the assignment of errors embraced the names of both the township and trustee as appellants, but the body of the assignment named the trustee only as complaining of error.

Held, that the assignment of errors was not by the township, but by the trustee. **Held,** also, that there was no judgment against the trustee from which he could appeal; and the appeal was dismissed on motion.

TOWNSHIP.—Corporation.—By the statute townships are corporations.

From the Newton Common Pleas.

W. H. Martin, C. H. Test, and D. V. Burns, for appellant.
J. R. Troxell, for appellees.

WORDEN, C. J.—The appellees sued the appellant as trustee, etc., upon an instrument of which the following is a copy:

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"\$135.

KENTLAND, IND., July 11th, 1870.

"The treasurer of Washington township, Newton county, State of Indiana, will pay to D. M. Marsh, Indianapolis, Indiana, one hundred and thirty-five dollars, with interest from date of shipment, for one hundred and fifty copies of Rice's Manual of Devotion, bound in cloth, payable July 1st, 1871, at Treasurer's office, Kentland, Indiana.

(Signed) "DAVID MARTIN, Township Trustee."

The plaintiffs held the instrument by assignment from the payee.

The defendant demurred to the complaint for want of sufficient facts, but the demurrer was overruled, and exception taken. The defendant failing to answer, judgment was rendered in favor of the plaintiffs, not against the defendant either in his personal or official capacity, but against the township.

The following is the assignment of error.

"Oliver G. McIlwaine, Trustee of Washington Township, Newton County, Indiana, and Washington Township, Newton county, Indiana, v. John R. Asher, George H. Adams, and Charles J. Higgins.

"Comes now the above named Oliver J. McIlwaine, as trustee of the township of Washington, in the county of Newton, and State of Indiana, and says there is manifest error in the foregoing record and proceedings of the court below, in this, that said court erred in overruling appellant's demurrer to the complaint of appellees, and in rendering judgment against appellant, the said township, for the reason that the complaint does not contain sufficient facts to constitute a cause of action against her; wherefore he prays that this cause be in all things reversed."

We are met at the threshold of the case here with a motion by the appellees to dismiss the appeal, because there was no judgment below against the appellant; and this motion must, in our opinion, prevail. We therefore do not decide whether Martin as trustee had power to bind the township by the instrument sued on. If he had not, then he

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alone, if any one, is liable. If the township is bound, then the latter should have been sued in her corporate name.

The statute (1 G. & H. 637, sec. 4) provides, that "each and every township, that now is, or may hereafter be organized in any county in this State, is hereby declared a body politic and corporate, by the name and style of _____ township of _____ county, according to the name of the township and county in which the same may be organized, and by such name may contract and be contracted with, sue and be sued in any court having competent jurisdiction." See, also, 1 G. & H. 570, sec. 1.

The township, as we have seen, was not sued in this case, but the appellant as trustee thereof. We decide nothing as to the validity of the judgment against the township, as she is not here asking a reversal. As before stated, there is no judgment against the appellant, McIlwaine, from which he can appeal. His appeal must therefore be dismissed.

The entitling of the cause here in the assignment of errors embraces the name of the township as an appellant, as well as that of McIlwaine, but the body of the assignment shows that McIlwaine only, and not the township, complains of error.

The appeal is dismissed, with costs.

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GRAND JURY.—When the record does not show the contrary, it will be presumed that the grand jury was regularly drawn, summoned, and empanelled. **SAME.—Reconvening of.**—Where the grand jury has been dismissed before the final adjournment of the court, it may, if necessary, be resummoned to attend again at the same term.

PRACTICE.—Motion.—Affidavit.—Affidavits in support of a motion for a continuance are not a part of the record, unless made so by a bill of exceptions. **SAME.—Discharge of Jury.—Waiver.**—The discharge of a jury in a criminal

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case must be excepted to at the time by the defendant, or he will be deemed to have waived any objection thereto.

ASSAULT AND BATTERY WITH INTENT TO COMMIT MURDER.—Definition.—In charging the jury in a prosecution for assault and battery with intent to commit murder, it was error to define the words "purposely and maliciously," used in the indictment, as being equivalent to the words "knowingly and wilfully," and to charge the jury that if the assault and battery was knowingly and wilfully done with intent to kill, this was sufficient to sustain the higher charge included in the indictment.

CRIMINAL LAW.—Presumption of Innocence.—The defendant in a criminal prosecution is presumed to be innocent until the contrary is shown, and it is error to refuse to so instruct the jury.

From the Elkhart Circuit Court.

W. A. Woods and W. C. Wilson, for appellant.

J. C. Denny, Attorney General, and W. C. Glasgow, Prosecuting Attorney, for the State.

OSBORN, J.—The appellant was indicted in the Elkhart Circuit Court at its April term, 1873, for an assault and battery with intent to commit murder. He moved to quash the indictment, which motion was overruled. He then pleaded not guilty, and the issue was tried by a jury, who found him guilty, and that he should be fined and imprisoned in the state prison. Motions for a new trial and in arrest of judgment were made and overruled, and judgment rendered upon the verdict. Proper exceptions were taken to the several rulings of the court, and the errors assigned present for our consideration the correctness of such rulings.

It is claimed that the motions to quash and in arrest of judgment should have been sustained, because the indictment was not returned by a lawful grand jury.

Prior to the act of March 6th, 1873 (Acts 1873, p. 87), the Elkhart Circuit Court commenced on the third Monday of March of each year. By that act the time of holding the court was changed to the fourth Monday of April. A statement of the clerk, preceding the entry of the usual order impanelling the grand jury, states that a grand jury was drawn by the county commissioners on the 3d day of March, 1873, that being the first day of the March term

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of the board, for the March term of the Elkhart Circuit Court, and a list of the names so drawn is given. The order impanelling the grand jury shows that the *venire* for the grand jury returned by the sheriff included the same names composing the list drawn by the board of commissioners. Some of them failed to appear, and their places were supplied by the sheriff, under the direction of the court. The grand jury so summoned was impanelled and sworn and afterward dismissed. During the term, the court found it necessary that they should be summoned to attend again at that term and ordered that they should be so summoned. A *venire* was issued to and served by the sheriff, and the same grand jury again impanelled and sworn, who afterward returned the indictment in this case.

The record does not show that the grand jury was not regularly and legally summoned and impanelled. *Bell v. The State*, 42 Ind. 335. It was said in that case that we would presume that the grand jury had been summoned in pursuance of an order of the judge, or that they had been summoned prior to the approval of the act of March 10th, 1873, Acts 1873, p. 158. We will also presume that they were regularly and legally impanelled after they had been sworn and acted, as in this case, unless there is something in the record showing that they were not. *Bailey v. The State*, 39 Ind. 438-49; *Lovell v. The State*, 45 Ind. 550.

In this case, there is nothing showing that the *venire* had not been issued to and served by the sheriff prior to March 6th, 1873, the date of the approval of the act changing the time of holding the court, and we will not presume that it had not. Sec. 84 of that act made such *venire* returnable to the first day of the court, as fixed and provided for by the act.

Sec. 15, 2 G. & H. 394, provides, that whenever the grand jury is dismissed before the final adjournment, they may be summoned to attend again at the same term, if necessary. It was under that section that the grand jury was called the second time, and not under section 2 of the act of March

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10th, 1873. The order which the last mentioned section authorizes the judge to make is not to summon a dismissed grand jury to attend again at the same term; but to call them together for the first time. The *venire* must be for the jury drawn and selected for the term to which it is returnable. The grand jury, as finally impanelled, may be, and usually is, composed of some who were not so drawn and selected. When impanelled and sworn, they became the grand jury for the term. It is the dismissed jury that is to be summoned again under section 15, *supra*, although it may include persons not drawn and selected for the term.

We do not think it necessary to consider whether a challenge to the array could have been supported or a plea in abatement taken. But see sections 11 and 12, 2 G. & H. 433; *Hardin v. The State*, 22 Ind. 347. In that case, after quoting those sections, it is said, p. 350: "Under the provisions of the section last above quoted, where a grand jury has been duly charged and sworn, as was done in the present case, it is not material in what manner they may have been selected to serve as such, unless the irregularity of their selection amounts to corruption." Sec. 876 to 881, and notes, 1 Bishop Crim. Proced. 9; 1 Wharton Crim. Law, sec. 472; *The State v. Brooks*, 9 Ala. 9; *The People v. Allen*, 43 N. Y. 28; *Friery v. The People*, 2 Keyes N. Y. 424; *The People v. Jewett*, 6 Wend. 386.

The appellant urges as another ground for arresting the judgment, that the record shows that he had been once in jeopardy before for the same offence.

The record shows that after the appellant had been arraigned and pleaded not guilty, a jury was impanelled and sworn to try the cause, and that it was then continued on the application of the appellant. He now urges that his application was not for a continuance for the term, but for a postponement. The affidavits upon which the motion was founded are copied into the record, but as they are not in any bill of exceptions they are not before us, and we cannot notice their contents. The record states, that he moved for a continu-

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ance, and that his motion was granted and the cause continued until the next term of the court. The jury were necessarily discharged. He failed to except or object. At the next term of the court, another jury was impanelled without objection, who returned a verdict of guilty, upon which verdict judgment was rendered against him, the court having overruled a motion in arrest. From that judgment this appeal is taken.

The failure of the appellant to object and except to the continuance for the term and to the discharge of the jury, was a waiver of any objection to such action of the court, and will be deemed to have been done with his consent. *Kingen v. The State, ante, p. 132.*

The court committed no error in overruling the motions to quash and in arrest of judgment.

One of the reasons for a new trial was error of the court in giving and refusing to give instructions to the jury.

The assault and battery charged in the indictment was, that the appellant maliciously and purposely shot one Hawkins, with the intent to kill and murder him. The court, in its charge, after defining the offence, instructed the jury, that it would be unnecessary for them to consider whether the shooting was done with the premeditated malice or not, "but it must have been done purposely and maliciously; that is, knowingly and wilfully done with intent and design to kill Hawkins, in order to sustain the higher charge included in the indictment." This was wrong. The jury were told that the words "knowingly and wilfully" are the equivalents of "purposely and maliciously;" that if the appellant shot Hawkins knowingly and wilfully, with the intent and design to kill him, he was not only guilty of an assault and battery, but of the higher charge of an intent to murder. It excludes the idea that one may knowingly and wilfully kill another in self defence, and be guilty of no offence. Now, it is of the very essence of the crime of murder, that the homicide shall be committed maliciously; and it is erroneous to instruct the jury, that if the killing is

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knowingly and wilfully done, it is murder. Whether proof of the homicide is presumptive evidence of murder, is a question not involved in the instruction under consideration, and about which judges and authors differ, and concerning which we express no opinion.

In *Dennison v. The State*, 13 Ind. 510, which was a prosecution for an assault and battery with intent to commit murder, the jury were instructed that if there was evidence of express malice, "that is, a positive intention to kill, existing in the mind of the slayer, at the time of inflicting the wound," the killing would be murder in the second degree. The court say: "This instruction contains an error, which may have misled the jury. It informs them that intention to kill, existing at the commission of the act, constitutes express malice. This is entirely wrong.

"In justifiable homicide, there is" (may be) "intention to kill, but not necessarily malice or premeditation."

At the proper time, the appellant asked the court to instruct the jury as follows:

"The defendant is presumed to be innocent until the contrary is shown, and where there is a reasonable doubt whether his guilt is satisfactorily shown, he must be acquitted;" which was refused, on the ground that the same had been substantially given in the instructions of the court.

We have carefully examined all the instructions, and find that the second branch of that asked and refused had been substantially given, but they were silent as to the presumption of innocence. The court should have charged the jury on that subject as asked, and an error was committed by its refusal to do so.

The judgment of the said Elkhart Circuit Court is reversed; and the cause is remanded, with instructions to that court to grant a new trial, and for further proceedings. The clerk is instructed to make the proper certificate to the warden of the state prison.

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SIDENER v. WHITE ET AL.

INJUNCTION.—Execution.—Property Subject to Execution.—An injunction will not be granted to restrain a sheriff from selling property sold by an execution defendant after the issuing of the execution, on the ground that the sheriff since the sale has wrongfully permitted the execution defendant to remove from the State and sell other property subject to the lien of the execution.

SAME.—An injunction will be granted to restrain a sheriff from selling property sold by an execution defendant after the issuing of the execution, until other property of the defendant subject to execution shall be exhausted.

From the Decatur Circuit Court.

J. Gavin and J. D. Miller, for appellant.

C. & J. K. Ewing, E. R. Monfort, S. A. Bonner, B. W. Wilson, and J. S. & O. B. Scobey, for appellees.

DOWNEY, J.—The only question presented by the assignment of errors in this case is that relating to the action of the court in sustaining the demurrer to the complaint. The following is the substance of the complaint:

The plaintiff complains of Giles E. White, sheriff, John E. Robbins, and John Hillis, who is executor of the will of William Hillis, deceased, and says that on the 21st day of November, 1871, the defendant John E. Robbins recovered a judgment against John J. Pavy, in the Decatur Circuit Court, for the sum of two thousand four hundred and seventy-nine dollars and thirty-two cents, upon which judgment execution issued on the 10th day of January, 1872; that on the 21st day of November, 1871, the defendant John Hillis, as executor of the will of William Hillis, deceased, recovered a judgment against John J. Pavy, as principal, and Ralph P. Pavy, as surety, for the sum of twenty-four hundred and twenty-five dollars, in the same court, upon which execution issued January 6th, 1872; and at their several dates the executions went into the hands of the sheriff, and are still in his hands; that the sheriff also held a large number of executions and fee bills, amounting, with the above named executions, to about the sum of six thousand dollars; that on the

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1st day of February, 1872, the said John J. Pavy sold and delivered to the plaintiff six pens of corn; supposed to contain about thirty-four hundred bushels of corn, and fifty-five head of hogs; that on the day of said sale to the plaintiff said John J. Pavy had a large amount of personal property on his farm in said county, to wit, fifty-five head of mules and four head of horses, worth fifty-nine hundred dollars, and other personal property worth two thousand dollars; that thereafter, on the 17th day of February, 1872, said White, as such sheriff, levied upon said hogs and said corn as the property of said John J. Pavy, by virtue of said executions, and would sell the same, unless restrained by the court, in satisfaction of said debts; that the sheriff, since the sale of said property to the plaintiff, had wrongfully permitted said Pavy to remove from the State and sell said fifty-five head of mules and said four head of horses of the value aforesaid, and having neglected to make the amount of said executions out of said property, has wrongfully levied upon the said property so sold to the plaintiff to pay said debts; that said John J. Pavy has other property, real and personal, out of which said executions might be made in full, without the sale of the property so sold to the plaintiff; that plaintiff has no lien upon or interest in any of said property, except that so sold to him; that the sheriff has advertised said hogs and said corn for sale, and will sell the same on the 13th day of April, 1872, unless restrained by the court, etc.; wherefore he prays that the sheriff be ordered and directed to levy upon and exhaust the property of said Pavy, other than that sold to this plaintiff before proceeding to sell the corn and hogs so sold to the plaintiff; that the sheriff be forever enjoined and restrained from selling said corn and hogs until the other property of said Pavy subject to execution be exhausted, and for a temporary restraining order, etc.

As to that part of the complaint which alleges "that the sheriff, since the sale of said property to the plaintiff, had wrongfully permitted said Pavy to remove from the State

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and sell said fifty-five head of mules and said four head of horses," etc., we think it constitutes no ground upon which the execution plaintiff can be enjoined from making his money out of the property which has been levied upon. The execution plaintiff is not shown to have had any connection with the non-feasance of the sheriff, or to have had any knowledge of it. The mere delay of the sheriff to levy upon the property, and its removal by the execution defendant from the State, in the meantime, can not affect the right of the execution plaintiff to make the money out of any property of the execution debtor subject to the execution.

That part of the complaint which charges that "Pavy has other property, real and personal, out of which said execution might be made in full, without the sale of the property so sold to the plaintiff," presents a different question. There would seem, if this allegation be true, no necessity for selling the property purchased by the appellant. Assuming that the property of which the execution defendant is yet the owner is within the reach of the officer, which may be inferred from the fact alleged that the amount of the execution might be made out of it, we can see no reason, but mere wantonness, for levying on the appellant's property. It does not appear that the rights of any one will be disturbed by levying upon the property still owned by the execution defendant. It is not denied by counsel for the appellees that where part of the lands of a judgment defendant subject to the lien of the judgment are sold by the judgment defendant after the lien has attached, the creditor must, if enough thereof still remains to pay the judgment, make his levy and sale of the part so remaining; and if the part so remaining unsold be not sufficient to discharge the whole amount, yet the creditor must exhaust the same before proceeding against the part so sold by the debtor, or that he must exhaust any other property of the debtor, provided it does not interfere with intervening equities or rights of other creditors. But it is insisted that the rule does not apply to a case like this, where the sale has been of part of personal property bound

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by the lien of an execution. Counsel say: "Sidener is a voluntary purchaser of Pavy's property, has no claim of any kind against Pavy, and, of course, no claim or lien upon the property—a mere naked, outside, voluntary purchaser of property, which he knew at the time to be subject to the liens complained against." These same objections to the granting of the relief asked, if valid, would prevent the granting of similar relief in case of the sale of a part of the real estate of the judgment defendant.

In *Clowes v. Dickenson*, 5 Johns. Ch. 235, the Chancellor said: "If there be a judgment against a person owning at the time three acres of land, and he sells one acre to A., the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B., the remaining acre is then chargeable, in the first instance, with the debt, as against B. as well as against A.; and if it should prove insufficient, then the acre sold to B. ought to supply the deficiency, in preference to the acre sold to A.; because when B. purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect, we may say of him, as is said of the heir, he sits in the seat of his grantor, and must take the land with all its equitable burdens; it can not be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment, or a ratable part of it, back upon A." And see *Russell v. Houston*, 5 Ind. 180; *Rorer Judicial Sales*, sec. 559, *et seq.*; *Hurd v. Eaton*, 28 Ill. 122.

It is the judgment which creates the lien upon the real estate, while it is the execution in the hands of the officer that creates the lien upon the personal property. In either case there is a lien, and we can see no sufficient reason why the same rule should not apply in each case. It is said by counsel that Sidener has no claim of any kind against Pavy, and no claim or lien on the property. This is a misapprehension. He is shown by the complaint to be the owner of

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the property by purchase from Pavy. He seeks to protect his title to the property by compelling the execution plaintiff to make his money out of the other property of Pavy, which is shown to be subject to execution and sufficient in amount to pay the debt. He does not ask to have his property absolutely freed from the lien of execution. This, we think, he can not successfully demand. He simply asks that his property shall not be sold until the other property of Pavy, subject to execution, shall be exhausted. To this extent, we think, he has a claim to equitable relief. If the plaintiff should have specified more particularly the property of Pavy subject to execution, this can be required of him by motion in the circuit court.

The judgment is reversed, with costs, and the cause is remanded.

FISHER ET AL. v. ALLISON ET UX.

From the Hamilton Common Pleas.

T. J. Kane and A. F. Shirts, for appellants.

J. W. Evans and R. R. Stephenson, for appellees.

PETTIT, J.—On the back of the transcript, the names of the parties are properly endorsed by the clerk of this court, but in the assignment of errors the names are reversed, thus making the Allisons appellants, when they did not appeal, and have no complaint to make in this court. The assignment of error is the complaint in this court, and the names of the parties should be placed accordingly. The party complaining should place his name before or above the name of the party complained of.

The submission is set aside, at the costs of appellants.

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FISHER ET AL. v. ALLISON ET UX.

INSTRUCTIONS.—*Practice.*—Instructions may be given either orally or in writing, when the court is not requested to give them in writing.

SAME.—*Bill of Exceptions.*—The giving or refusing to give instructions must be excepted to, and must be presented on appeal by bill of exceptions, or by exceptions noted as required by the statute.

EVIDENCE.—*Ground of Objection.*—The ground of objection to the admissibility of evidence should be pointed out to the court below, and stated in the bill of exceptions.

SAME.—When evidence is excluded, the exclusion may be sustained on the ground assumed in the court below, or on any other valid ground.

From the Hamilton Circuit Court.

T. J. Kane and A. F. Shirts, for appellants.

J. W. Evans and R. R. Stephenson, for appellees.

DOWNEY, J.—Margaret Allison, and her husband, John T. Allison, sued Daniel Fisher and Nathaniel F. Dunn. Margaret Allison owned a house and ground in Noblesville. The defendants owned adjoining ground, and erected a building thereon. It is alleged in the first paragraph of the complaint, that the defendants threw on the roof of her house, which was "a good tight roof, made of shingles of wood," a large amount of brick, mortar, dirt, timber, and other rubbish, whereby the shingles of said roof were displaced and broken, in consequence of which it leaked, and the water ran into the house and the walls thereof, damaging the papering and plastering of the same.

In the second paragraph of the complaint, it is stated, that in excavating for the foundation of their house, the defendants negligently and unlawfully undermined the walls of the plaintiffs' said house, causing the walls to sink and crack, and permanently injuring the same.

The answer was a general denial. A trial by jury ended in a verdict for the plaintiffs, assessing their damages at eighteen dollars. A motion for a new trial was made by the defendants, and overruled by the court, and there was judgment on

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the verdict. The only properly assigned error is the overruling of the motion for a new trial.

The first reason for a new trial was, that the verdict was contrary to law; the second, that it was contrary to the evidence; and the third, that the verdict was not sustained by sufficient evidence.

We are satisfied, from an examination of the record, that these reasons for a new trial were properly disallowed.

The fourth reason was, that the damages were excessive. There is nothing in this reason. The evidence fully warranted the amount of damages given.

The fifth reason was, that the court gave a part of his charge to the jury orally, and part in writing. We know of no authority for holding this to be erroneous. Had the court been requested to give the charge in writing, and refused to do so, it would have been error. But no such case is shown by the record.

The sixth reason was the giving of instructions one, two, and three, asked for by the plaintiffs. The instructions to which reference is made are not in any bill of exceptions, and no exception to the giving thereof is noted by counsel, as required by statute. 2 G. & H. 201, sec. 325.

The seventh reason for a new trial was the refusal of the court to give instructions numbered one and two, asked by the defendants. These instructions, like the others, are not in any bill of exceptions, and counsel have not noted thereon any exception to the refusal to give them.

The eighth reason was the overruling of an objection made by the defendants to certain evidence offered by the plaintiffs. The bill of exceptions shows that the defendants objected to the admissibility of this evidence, but does not show that the ground of the objection was pointed out to the court. It was only fair to the court trying the cause that the ground of the objection should have been stated; and the bill of exceptions should state that this was done, and also what the objection was. The party must then make good the objection in this court, and cannot succeed by showing some other objection

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here. When the court excludes evidence, its decision may be sustained on any ground, whether the ground assumed in the court below, or on some other.

The judgment is affirmed, with ten per cent. damages and costs.

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BROADHEAD *v.* MCKAY.

CHATTEL MORTGAGE.—Possession of Mortgaged Property.—The principle of the common law prevails, unchanged by the statutes of this State, that where a mortgage of personal property is silent as to possession, the mortgagor is entitled to immediate possession upon the execution of the mortgage.

SAME.—Statute.—The provision of the statute (2 G. & H. 355, sec. 1,) that “unless a mortgage specially provides that the mortgagor shall have possession of the mortgaged premises, he shall not be entitled to the same,” applies to mortgages of real estate, and not of personal property.

SAME.—Sale of Mortagor's Interest on Execution.—Sec. 436, 2 G. & H. 240, which provides that the interest of the mortgagor of goods may be sold on execution, does not give the purchaser the right of possession, except upon his compliance with the conditions of the mortgage.

SAME.—Foreclosure.—Though an action to foreclose a chattel mortgage will lie to enforce the lien and extinguish the equity of redemption of the mortgagor, yet the mortgagor may take possession and sell without foreclosing.

From the Posey Circuit Court.

W. Harrow and W. M. Hoggatt, for appellant.

E. M. Spencer, W. Loudon, and J. Pitcher, for appellee.

WORDEN, C. J.—This was an action of replevin for some horses and a wagon, brought by the appellant against the appellee. Issue, trial by the court, finding and judgment for the defendant.

The only question in the cause arises upon the evidence. The facts in the case are briefly these: The defendant mortgaged the property in question to the plaintiff to secure the payment of a debt which the defendant owed to the plaintiff, but which had not become due at the commencement of the

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action. The mortgage is silent as to the possession of the property. The question presented is, whether the plaintiff was, under the circumstances, entitled to the possession of the property.

In *Case v. Winship*, 4 Blackf. 425, it was held that the mortgagee of goods (the mortgage being silent on the subject) was entitled to their immediate possession. Such is doubtless still the law, unless it has been changed by statute.

In the case of *Blakemore v. Taber's Ex'r*, 22 Ind. 466-70, it was said that "as our statute places chattel mortgages on the footing of mortgages upon real estate, in this, that it recognizes the legal title, the equity of redemption, as remaining in the mortgagor, and the mortgagee as having but a lien, it follows that a foreclosure is the proper mode of procedure to enforce the lien, and extinguish the equity of redemption."

The point there under consideration was, whether an action or bill would lie to foreclose a chattel mortgage, and not whether the title to the mortgaged chattel passes conditionally to the mortgagee. Conceding, under many decisions of this court, that an action will lie to foreclose such mortgage, it does not follow that the mortgagee has no other remedy.

Story says, speaking of chattel mortgages, that "there is no necessity to bring a bill of foreclosure; but the mortgagee, upon due notice, may sell the personal property mortgaged, as he could under the civil law; and the title, if the sale be *bona fide* made, will vest absolutely in the vendee." 2 Story Eq., sec. 1031.

"By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee; and if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although equity will interfere to compel a redemption." Story Bail., sec. 287.

If, where the mortgage is silent as to the possession of mortgaged goods, the mortgagee is not at once entitled to the possession of the goods, it is difficult to see how he becomes entitled to possession after breach of the condition; and if

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not then entitled to possession, it would seem to be impossible for him to make a sale of them according to the common law. We have, therefore, been led to inquire whether we have any statute which makes such change in the common law. The only statute referred to in the case of *Blakemore v. Taber's Ex'r, supra*, is 2 G. & H. 240, sec. 436. This section provides for the sale of the interest of the mortgagor in the goods mortgaged, on execution against him, and that the purchaser shall be entitled to the possession upon complying with the conditions of the mortgage. This section does not, in our opinion, effect the supposed change in the law. It does not give the purchaser the right to possession except upon his compliance with the conditions of the mortgage. The mortgagor, where there is no such sale, would have the same right upon the same terms. See, as to construction of this section, the cases of *Heimberger v. Boyd*, 18 Ind. 420, and *Coe v. McBrown*, 22 Ind. 252.

The only other statutory provision to which our attention has been called, and we are aware of no other that seems to have any bearing upon the question, is the following :

"Unless a mortgage specially provide, that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same." 2 G. & H. 355, sec. 1. This provision, we think, clearly has reference to mortgages of real estate, and not of personal property. The term "mortgaged premises" is never used, so far as we are aware, either in common or legal parlance, with reference to purely personal property. Legislators, courts, lawyers, and people speak of mortgaged premises when they have reference to real estate mortgaged, but we have never heard the term applied to personal property mortgaged. "Mortgaged property" is the term usually applied to personality. We feel clear, therefore, that it was not the intention of the legislature, by the section quoted, to provide that the mortgagee of goods should not have the possession of them unless the mortgage should specially provide for such possession.

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The third section of the same act provides, in substance, that no mortgage of real estate shall authorize the mortgagee to sell the mortgaged premises, but that every such sale shall be made under a judicial proceeding; leaving the inference that personal property may be sold by the mortgagee without any such proceeding. Such sale could not well be made, and perhaps not at all (as we suppose it must be made at public auction, after due notice), unless the mortgagee has possession.

We conclude, therefore, that the law as it formerly stood, in this respect, has not been changed by legislation; and that the mortgagee of personality, the mortgage being silent as to possession, is immediately upon the execution of the mortgage entitled to the possession of the mortgaged property. It follows that the motion made by the plaintiff for a new trial, because the finding was contrary to the evidence, should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

HARVEY v. DAVIS ET AL.

From the Hamilton Circuit Court.

R. Graham and J. O'Brien, for appellant.

D. Moss, for appellees.

PETTIT, J.—This was a suit by the appellant against the appellees, to review a judgment rendered in favor of the appellees against the appellant.

The record shows that a demurrer to the complaint was filed and sustained. No demurrer is in the transcript, nor does it show for what cause or reason the demurrer was filed.

The statute only allows a review for two causes: first,

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for error of law appearing in the proceedings and judgment; second, for new matter discovered since the rendition thereof. 2 G. & H. 280, sec. 587. And neither of these causes is shown in the complaint.

The judgment is affirmed, at the costs of the appellant.

SPECHT ET AL. v. WILLIAMSON ET AL.

PRACTICE.—*Amended Complaint.*—Where an amended complaint is filed, covering all the matter contained in the original complaint and the amendments thereto, if any, the original complaint ceases to be a part of the record, and the answers which have been filed to it, if any, go out of the record with it.

SAME.—*Reasons for New Trial.*—That the finding and judgment of the court should have been for the defendant instead of for the plaintiff, is not, in form, one of the statutory reasons for a new trial.

From the Spencer Circuit Court.

L. Q. DeBruler and C. A. DeBruler, for appellants.

W. H. Blount, E. R. Hatfield, T. F. DeBruler, and C. E. DeBruler, for appellees.

DOWNEY, J.—Action by the appellees against the appellants Specht, Laird, Kramer, and Jacobs, on a promissory note executed by the defendants to the Rockport Banking Company, dated November 20th, 1871, at ninety days, payable at the house of said banking company, alleged to have been sold and transferred by delivery to the plaintiffs. The company was made a party defendant, to answer as to its interest in the assignment. Specht, the principal in the note, made default, and judgment was rendered against him.

To the original complaint, there was an answer of five paragraphs by the other defendants, and a reply thereto. Leave was then granted to the plaintiffs to amend the complaint, and an amended complaint was filed. In the amended complaint, the persons composing the banking company are

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named as parties, instead of the company. They are not parties to the appeal. The defendants Laird, Kramer, and Jacobs, answered by a general denial. There was a trial by the court, a finding for the plaintiffs, a motion for a new trial overruled, and judgment on the finding. The refusal of the court to grant a new trial is the error alleged.

It is necessary, in the first place, to ascertain the condition of the record. This is easily done by the application of well settled rules of practice. When an amended complaint is filed, covering all the matter contained in the original complaint and the amendments thereto, if any, the original complaint ceases to be a part of the record, and the answers which have been filed to it, if any, go out of the record with it, as a necessary consequence. 2 G. & H. 273, sec. 559; *Yancy v. Teter*, 39 Ind. 305; *Miles v. Buchanan*, 36 Ind. 490. To the amended complaint in this case, applying this rule, there was no answer but a general denial.

The reasons for a new trial, as stated in the motion, are as follows :

1. That the finding and judgment of the court are contrary to law and to the evidence given on the trial of said cause.
2. That the finding and judgment of the court should have been for the said defendants John Kramer, Jesse W. Laird, and William Jacobs, instead of for the plaintiffs.

The last of these reasons is not, in form, any of the reasons mentioned in the statute for which a new trial may be granted. 2 G. & H. 211, sec. 352. Perhaps it is embraced in the first reason.

We cannot see that the finding is contrary to law. Is it contrary to the evidence, or, in the language of the statute, "not sustained by sufficient evidence?"

The persons composing the banking company answered, that they had no interest in the note on which the action was brought. What evidence was necessary to make out the plaintiffs' case? The fact of the execution of the note by the defendants was not in any way disputed. Conceding

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that it was necessary for the plaintiffs, under the general denial, after the payees had disclaimed any interest in the note, to prove the sale and transfer of it by the payees to them, we think the court might properly have found that fact from the evidence before it.

The judgment is affirmed, with two per cent. damages and costs.



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CONSIDERATION.

See **PLEADING, II.**

Promissory Note.—Answer.—Want of Consideration.—In a suit upon a promissory note given for a patent right, where a want of consideration is pleaded in answer, the facts that the patented machine was tested and found worthless, and that the defendant offered to rescind the contract, will not defeat a recovery upon the note. *Detrick v. McGlone et al.*, 291

CONSTITUTIONAL LAW.

See **WAY, I.**

1. *Supreme Court*.—When a statute has been held unconstitutional by the

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Supreme Court, it is inoperative while such decision is maintained; but a later decision sustaining such statute gives it vitality from the time of its enactment, and it is to be treated as having been constitutional from the beginning.

Pierce et al. v. Pierce, 86

2. *Same.—Descents.*—The act of March 4th, 1853, dividing the property of an intestate, in certain cases, between his parents and his widow, was treated as unconstitutional under the ruling in *Langdon v. Applegate*, 5 Ind. 327; but the case of *The Greencastle Southern Turnpike Co. v. The State, ex rel. Malot*, 28 Ind. 382, established its constitutionality; and the property of an intestate who died between March 4th, 1853, and the repeal of said statute by the act of March 9th, 1867, descended according to its provisions, and a right thereunder might be asserted, where suit was brought within the time limited by the act of 1867. *Ib.*
3. *Relocation of County-Seat.*—Section 1 of the amendatory act in reference to the relocation of county-seats (3 Ind. Stat. 171) is constitutional.
Board of Commissioners of Clay Co. et al. v. Markle et al., 96
4. *Title of Statute.*—Where the title of a statute recited that it was to amend section 1 of a certain act, and also section 1 of an act amendatory of said former act, a reference in the body of said statute to "section 1 of the above recited act" was held to mean section 1 of said amendatory act, and not section 1 of said amended act, which, having been once amended, was no longer in existence, and therefore was not subject to amendment. *Ib.*
5. *Fee and Salary Act of 1871.*—The fee and salary act of 1871, Acts 1871, p. 25, is not unconstitutional because it makes the salary of the sheriff payable out of the fund denominated therein the county officers' fund, or because the amount of said fund may be less than the amount of salary and deputy hire on account of the deficiency of the fund or of the amount paid in by the sheriff; but said act violates section 22 of article 4 of the constitution, by making the salaries of sheriffs ununiform. Under said act, therefore, the sheriff is not a salaried officer.
Fulk v. The Board of Commissioners of Monroe Co., 150
6. *Same.—Payment of Fees into Treasury by Sheriff.*—The provision of the fee and salary act of 1871, Acts 1871, p. 25, requiring the sheriff to pay his fees into the county treasury is unconstitutional. The fees when collected by the sheriff are his own. *Ib.*
7. *Judicial Circuits.*—The act to divide the State into circuits for judicial purposes, etc., approved March 6th, 1873 (Acts 1873, p. 87), so far as it authorizes the election of prosecuting attorneys in October, 1873, is constitutional.
The State, ex rel. Pitman, v. Tucker, 355
8. *General Law.—Legislature.*—The legislature is the exclusive judge whether a law on any subject not enumerated in section 22 of article 4 of the constitution can be made general and applicable to the whole State. *BUSKIRK, J., dissented.* *Ib.*
9. *Statute.—Subject of Act.*—The subject of the act to divide the State into circuits for judicial purposes, etc., approved March 6th, 1873 (Acts 1873, p. 87), is circuit courts, and the other matters in the act are properly connected therewith. *Ib.*

CONTEMPT.

1. *Constructive Contempt.—Affidavit.*—If proceedings against a party for a constructive contempt are commenced by affidavit, all the facts necessary to constitute the contempt should be stated in the affidavit.
McConnell v. The State, 298
2. *Same.*—Until a party has been subpoenaed to attend before the grand jury, or a subpoena has been issued for him, it is not a contempt of court for a person to induce him to absent himself in order that he may not be subpoenaed. *Ib.*

3. *Same.*—*Sufficiency of Affidavit.*—An affidavit charging an indicted person with a contempt of court by informing a witness, subpoenaed to testify on the trial of the indictment, that it was non-prossed, and thus procuring the witness not to attend, without showing that the statement was untrue, is insufficient. *Ib.*
4. *Jury.*—*Power of Justice of the Peace.*—*Juror.*—A justice of the peace has power to attach and punish as for a contempt jurors who, after being sent out to consult upon a verdict, escape and go away without leave of the justice, before returning a verdict. *Murphy v. Wilson et al.*, 537
5. *Same.*—When a jury is sent out by a justice of the peace to consult upon their verdict, the justice must determine when they have consulted together for a reasonable time; the jury cannot determine this for themselves, and separate without leave of the justice. *Ib.*
6. *Same.*—If jurors do thus separate without leave of the justice, no affidavit of the fact need be filed to authorize the justice to issue an attachment against the jurors for the same. *Ib.*
7. *Same.*—It is not a valid excuse for such jurors that they were hungry, or that the place assigned them for their deliberations was not comfortable or well adapted to the purpose. *Ib.*
8. *Same.*—*Sufficiency of Writ.*—A writ of attachment in such case, reciting the names of the jurors, and alleging their escape without leave of the justice, and ordering their arrest to answer for the alleged contempt, is substantially correct, and is sufficient to authorize the arrest of the parties. *Ib.*

CONTINUANCE.

See BILL OF EXCEPTIONS, 12.

CONTRACT.

See SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS; VENDOR AND PURCHASER.

1. *Void Contract.—Rescission.*—Where a contract is void, the doctrine relating to the rescission of a contract, as to the time within which it may be rescinded, does not apply. *The U. C. L. Ins. Co. et al. v. Thomas*, 44
2. *Answer.—False Representation as to Written Instrument.*—In an action on a note payable one year after date, and to foreclose a mortgage executed to secure it, an answer that the plaintiff represented at the time the mortgage was made that it was payable in five years, and, relying on the word of the plaintiff, the defendant did not read the mortgage or have it read, and that the original agreement was that the defendant should have five years, was not a good answer. *Bacon v. Markley*, 116
3. *Promise to Pay Board of Adult Daughter.*—A father is liable for the board of his daughter over twenty-one years of age, if furnished at his request, though no promise to pay such board be made in writing. *Kernodle v. Caldwell, Adm'r*, 153
4. *Same.*—Nor will the fact that the daughter in such case may have taken up her home with the party furnishing such board, and rendered services for such party without expectation of charging for the same, or being charged for board, relieve the father from his liability, if the board was furnished at his special instance and request. *Ib.*
5. *Construction of.*—On February 10th, 1869, a written contract was executed, whereby B. purchased of T. & T. certain water-wheels, to be used in the mill of B., the latter to have the privilege of running the wheels thirty days, and if they did not work to his entire satisfaction, he had the right to return the same, at his mill, after such thirty days' trial, he notifying the vendors of his dissatisfaction; and in that case the latter were to pay freight and

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the expenses of putting in and taking out said wheels. The vendors also warranted the wheels to give the same power, under any head of water, as certain other wheels named, which warranty was to extend to September 1st, 1869.

Held, that the right to reject the wheels was limited to thirty days after commencing the use of them, and that it did not extend to the time of the expiration of the warranty. *Barlow v. Thompson et al.*, 384

CONVEYANCE.

See VENDOR AND PURCHASER.

1. *Construction.—Remainder.—Trust Deed.*—Where, by the terms of a trust deed, a life estate is given to A., remainder for life or during widowhood to four females, B., C., D., and E., with remainder in fee to their children, the children of each to inherit and receive the share of their mother, the fee simple does not vest in B., C., D., and E. *Owen et al. v. Cooper*, 524
2. *Same.—Words.—“Children.”*—The word “children” in such case is not to be understood as a word of limitation. It is a word of purchase. *Ib.*
3. *Same.—“Inherit.”*—The word “inherit,” as used in such deed, indicates that the children shall take by families, and not as individuals. *Ib.*
4. *Same.—Shelley’s Case.*—The use of the word “children” in such deed does not bring the case within the rule in Shelley’s case. *Ib.*
5. *Same.—Vested Interest in Children.*—An interest in the lands, by virtue of the deed of trust, vested in the children of B., C., D., and E. *Ib.*
6. *Same.—Remainder.—Contingency.*—The remainder in such case is not limited on a contingency which operates to abridge or destroy the particular estate. The contingency of death or marriage is in the particular estate, and not the remainder. *Ib.*
7. *Same.—Vested Estate.*—The trust deed gave the children of C. a vested remainder, to take effect in possession upon the death or marriage of C. *Ib.*
8. *Same.*—The death of F., a daughter of C., who was living at the time of the execution of the deed of trust, but who died before C., could not destroy or forfeit the estate of F., but at her death it descended to her son. *Ib.*
9. *Remainder.—Personal Property.*—A remainder may be created in personal property as well as in real estate. *Ib.*

CORONER.

See JUSTICE OF THE PEACE, 1, 2.

CORPORATION.

See CITY; COUNTY COMMISSIONERS, 2; DRAINING ASSOCIATION; RAILROAD; TOWN; TOWNSHIP; TURNPIKE; VARIANCE.

1. *Pleading.*—In an action by a corporation, an answer of general denial does not put in issue the existence of the corporation. *The Indianapolis Furnace and Mining Co. v. Herkimer*, 142
2. *Organization.*—The signing of articles of association by parties proposing to form a manufacturing corporation does not create such corporation; the subscribers must also make, sign, and acknowledge the certificate of incorporation prescribed in section I of the act for the incorporation of manufacturing corporations, and must file the same in the recorder’s office of the proper county and a duplicate thereof in the office of the secretary of state. Until these steps have been taken, the corporation has no legal existence. *Ib.*
3. *Stock Subscription.—Estoppel.*—Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation. *Ib.*

4. *Evidence.*—When *nul teil corporation* is properly pleaded, the burden of proving the existence of the corporation is on the plaintiff, and to overcome such plea a compliance must be shown with the statutory requirements for the formation of the corporation. *Ib.*
5. *Same.*—Evidence of the parol admission by the defendant of the existence of the corporation will not supply the lack of proof that the statutory requirements have been complied with. *Ib.*
6. *Same.*—Ownership of property by a corporation may be proved by the same kind of evidence that would prove ownership in a natural person. *Lowe et al. v. The State*, 305

COSTS.

Appeal From Justice of the Peace.—Where an action for taking and converting personal property has been tried before a justice of the peace, and has been appealed to the circuit court by the defendant, and it is there tried, and the judgment is reduced more than five dollars, if the defendant appeared before the justice, he is entitled to recover his costs in the circuit court. *Brown v. Duke*, 343

COUNTY CLERK.

See GUARDIAN AND WARD, 1.

Official Bond.—*Surety.*—*Guardian and Ward.*—As it is not a duty imposed by statute upon a county clerk to receive money belonging to a ward from a guardian, the sureties on the official bond of the clerk are not liable for such money received by the clerk, though received pursuant to an order of the court of common pleas directing the guardian, upon resigning his trust, to deposit with the clerk the balance in his hands due to his ward. *Scott et al. v. The State, ex rel. Roberts et ux.*, 203

COUNTY COMMISSIONERS.

See APPEAL, 1, 2, 3; INJUNCTION, 4, 6; JURISDICTION, 1 to 8.

1. *Parol Contracts of.*—A parol employment by the board of county commissioners, at a legal session, of an attorney to defend a suit brought against the county is valid, and such attorney, having rendered the service involved in his employment, may recover compensation therefor. *McCabe v. The Board of Commissioners of Fountain Co.*, 380
2. *Same.*—In employing counsel, the board of county commissioners acts as a corporation, and, like other corporations, may employ agents and attorneys without making such employment a matter of record; but this must be done by the concurrent act of a majority of the board at a legal session. *Ib.*
3. *Power to Bind County.*—*Attorney.*—The board of county commissioners can not render the county liable for services rendered by an attorney as such by a contract with such attorney, or an employment of him, when such board is not in session according to law, or when the members of the board are acting successively and separately. *The Board of Commissioners of Cass Co. v. Ross et al.* 404

COUNTY-SEAT.

See TOWN PLAT; VENDOR AND PURCHASER.

Relocation of. See CONSTITUTIONAL LAW, 3; INJUNCTION, 6; JURISDICTION, 3, 4, 5.

COUNTY TREASURER.

1. *Fees for Disbursing Special School Tax.*—County treasurers are entitled to one per cent. for collecting and disbursing special school taxes. *Adams v. The Board of Commissioners of Whitley Co.*, 434

2. *Same.—Over-Payment by Mistake.*—When, by mistake, ignorance of his rights, or oversight, the treasurer has made a full settlement with the county board, without receiving the commission allowed him by law for the collecting and disbursing of such taxes, he may maintain an action to recover such compensation, if the board, on his claim being properly presented, refuse to allow it. *Ib.*
3. *Same.—Voluntary Payment.*—The doctrine of voluntary payments is not applicable to such a case, but the rights of the treasurer and the duty of the board of commissioners are governed by sec. 120 of the assessment law, *1 G. & H. 101.* *Ib.*
4. *Same.—Case Criticised.*—In the opinion in *Shoemaker v. The Board, etc.*, 36 Ind. 175, the scope and effect of said section 120 were limited and restricted too much. *Ib.*

COURT.

See RECEIVER.

Power of in Term Time and Vacation.—Where a law authorizes or contemplates the doing of an act by a court, it is and must be understood that the court in term time may or must do it, and the judge in vacation cannot, unless the power is expressly conferred upon him by law.

Newman v. Hammond, 119

CRIMINAL LAW.

See LIQUOR LAW; PRACTICE, 12; VARIANCE.

1. *Assault and Battery.—Evidence.*—On the trial of an information for assault and battery, evidence is admissible, to show the animus of the defendant and give character to the alleged offence, that a felony had been committed in the neighborhood within a few days before the alleged assault and battery, that there were circumstances of suspicion that the prosecuting witness had committed the felony, that the defendant and others, as members of an association authorized by law for the detection and apprehension of felons, arrested said witness upon suspicion of having committed the felony, and that such arrest was the assault and battery complained of. *Kercheval v. The State*, 120
2. *Juror.—Competency.—Waiver.*—On the trial of a criminal cause, the defendant, as well as the State, by failing to interrogate the jury as to their being householders or freeholders, or to take other steps to ascertain their competency in that respect before accepting them and before they are sworn to try the cause, waives objection on the ground of the want of such qualifications, and the defendant as well as the State will be bound by the verdict of such jury, though one or more of them may not be householders or freeholders. *Kingen v. The State*, 132
3. *Same.—Jeopardy.*—By the swearing of such jury to try the cause after such waiver, the defendant was put in jeopardy, and was entitled to have a verdict at their hands; and the discharge of one of such jurors by the court on finding that he was not a freeholder or householder, without the consent of the defendant, would have been equivalent to the acquittal of the defendant, and such defendant could not again have been put on trial for the same offence. But the defendant being in court in person and by counsel, at the time such juror was discharged, and neither excepting nor objecting, such discharge must be held to have been with the consent of the defendant, and subsequently putting the defendant on trial was not error. *Ib.*
4. *Circuit Court.—Criminal Causes Commenced by Affidavit and Information.*—Section 79 of the act abolishing courts of common pleas, etc., Acts 1873, p. 87, does not confer upon the circuit court the power to hear and determine a criminal cause commenced in that court by affidavit and information. *The State v. Justice*, 210

5. *Assault.—Affidavit.*—In the affidavit in a prosecution for an assault, the offence is sufficiently described if it be stated in the language of the statute.
The State v. Trulock, 289
6. *Instructions.—Alibi.*—Upon the trial of a defendant on a criminal charge, where there is evidence tending to prove an *alibi*, it is proper to instruct the jury that if, from the evidence, they have a reasonable doubt as to whether the defendant was at the place where the crime was committed, at the time, or was at the place where the evidence tends to show he was, they should find him not guilty.
Binnis v. The State, 311
7. *Same.*—In such case it is error to instruct the jury that the defence of *alibi* is good, if proved true by witnesses worthy of credit, but does not belong to the doctrine of doubts, which entitles the defendant to be acquitted, but when established, it entitles the defendant to be acquitted upon the higher ground of innocence established.
Id.
8. *Evidence.*—On a trial of an indictment for murder, it is error to admit in evidence against the defendant a transcript of the pleadings and papers in an action of divorce by the deceased against the defendant, pending in court and undetermined at the time of the alleged murder.
Id.
9. *Same.—Declarations in Extremis.—Opinion not Admissible as Such.*—On a trial for murder, declarations of the deceased, made when *in extremis*, consisting of expressions of opinion as to who it was that fired the fatal shot, based on previous threats and what had previously occurred between the deceased and the accused, are inadmissible.
Id.
10. *Same.*—Where a written memorandum of declarations made *in extremis* is not signed, parol evidence of such declarations is admissible. If signed, the writing should be produced or accounted for.
Id.
11. *Grand Jurors.—Record.*—Where the record states that the grand jurors returning an indictment were "good and lawful men, householders" of the proper county, it will be presumed that they possessed all the statutory qualifications.
Willey et al. v. The State, 363
12. *Indictment.—Motion to Quash.*—A motion to quash an indictment must, as a general rule, be predicated upon objections apparent upon the face of the indictment.
Id.
13. *Same.—Return of Indictment.*—Where the record recites that the grand jury came into "open court and returned the following indictment," giving its number and setting it out, it sufficiently shows that it was returned into open court, and sufficiently identifies the indictment.
Id.
14. *Same.—Filing Indictment.*—The statute does not require the clerk to file an indictment in open court or that the act of marking it filed shall be done in open court.
Id.
15. *Same.—Voluntary Manslaughter.*—An indictment for manslaughter charging that the defendant did, on, etc., at, etc., unlawfully and feloniously kill a person named, by then and there unlawfully and feloniously cutting, stabbing, and mortally wounding said person with a knife, etc., is sufficient. So, also, if it is charged that the instrument used was unknown to the grand jurors.
Id.
16. *Involuntary Manslaughter.*—Involuntary manslaughter is where the killing is done involuntarily, but in the commission of some unlawful act.
Id.
17. *Same.—Indictment.*—An indictment for involuntary manslaughter must show that the defendant was in the commission of some unlawful act, and that the death resulted therefrom.
Id.
18. *Same.*—Alleging in such case that the death resulted from using, unlawfully, wilfully, and feloniously, an instrument upon a pregnant female, for the purpose of producing a miscarriage, the use of such instrument not being necessary to preserve the life of the woman, is insufficient.
Id.
19. *Practice.—Indictment Containing Good and Bad Counts.—General Finding of Guilty.*—Where a defendant is found guilty upon an indictment contain-

ing two or more counts, one of which is bad, and the evidence tends to support the bad count, and none of it to support the good counts, the judgment must be reversed. *Ib.*

- 20. Motion for Leave to File Paper.—Affidavit.**—Where, on appeal to the circuit court, in a prosecution for a misdemeanor instituted before a justice of the peace, the State moved for leave to file a substituted affidavit, the original having been lost from the files, and filed affidavits showing that said original was not on the files, and had been lost, but did not produce or offer to file a substitute, the motion was properly overruled, and the prosecution was thereupon properly dismissed for want of an affidavit.

The State v. Tooky, 378

- 21. Larceny.—Possession of Stolen Goods.**—On a trial for larceny, where the possession by the prisoner of the property alleged to have been stolen has been proved by the State as a circumstance to establish guilt, it is error for the court to assume, in its charge to the jury, that such property was stolen, and then to charge that its possession by the defendant in a short time thereafter raised a presumption that he stole it, which if not explained by him would authorize the jury to find a verdict of guilty.

Smathers v. The State, 447

- 22. Possession of Stolen Goods.—Evidence.**—A party in possession of personal property is presumed to be the owner; but when it is proved that the property has been stolen, and it is found, recently after the larceny, in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession, and if he fails to satisfactorily account for such possession or gives a false account, the presumption arises that he is the thief. Such possession may be explained, either by direct evidence or the attending circumstances, or by the character and habits of life of the possessor, or otherwise, but if not explained in some one of these modes, the evidence of guilt is deemed conclusive. *Ib.*

- 23. Circuit Court.—Affidavit and Information.**—The circuit court cannot try a charge of felony upon an affidavit and information filed in that court.

Bell v. The State, 453

- 24. Larceny.—Evidence.**—On the trial of a prosecution for larceny, the evidence must show that the thing alleged to have been stolen was the property of the person alleged. *Ib.*

- 25. Bigamy.—Evidence.—Admissions of Defendant.**—In a prosecution for bigamy, it is competent to prove the former marriage by the admissions and declarations of the defendant. *Squire v. The State*, 459

- 26. Same.—Instruction.—Criminal Intent.**—In a prosecution for bigamy, it is proper to charge the jury that if they believe from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care, and made due inquiry, to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, then they should find for the defendant. *Ib.*

- 27. Same.—Reasonable Doubt as to Life of First Wife.**—In a prosecution for bigamy, the State must prove beyond a reasonable doubt that the first wife was living at the time of the second marriage. Where there is no direct evidence on this point, and the only evidence is, that the first wife was alive two years previous to the second marriage, the presumption of the continuance of her life is neutralized by the presumption of the innocence of the defendant, and in such case there can be no conviction. *Ib.*

- 28. Same.—Evidence.**—In a prosecution for bigamy, it is not error to admit in evidence the marriage license, and the return made thereon by the clergyman who performed the marriage ceremony at the second marriage. *Ib.*

- 29. Grand Jury.**—When the record does not show the contrary, it will be presumed that the grand jury was regularly drawn, summoned, and empanelled.

Long v. The State, 582

30. *Same.—Reconvening of.*—Where the grand jury has been dismissed before the final adjournment of the court, it may, if necessary, be resummoned to attend again at the same term. *Ib.*
31. *Discharge of Jury.—Waiver.*—The discharge of a jury in a criminal case must be excepted to at the time by the defendant, or he will be deemed to have waived any objection thereto. *Ib.*
32. *Assault and Battery with Intent to Commit Murder.—Definition.*—In charging the jury in a prosecution for assault and battery with intent to commit murder, it was error to define the words "purposely and maliciously," used in the indictment, as being equivalent to the words "knowingly and wilfully," and to charge the jury that if the assault and battery was knowingly and wilfully done with intent to kill, this was sufficient to sustain the higher charge included in the indictment. *Ib.*
33. *Presumption of Innocence.*—The defendant in a criminal prosecution is presumed to be innocent until the contrary is shown, and it is error to refuse to so instruct the jury. *Ib.*

DECEDENTS' ESTATES.

See GUARDIAN AND WARD, 2 to 5; TRUST AND TRUSTEE.

1. *Claim.—Action to Set Aside.—Allowance of Claim.*—A legatee and the heirs of a testator may sustain an action against the executor and a creditor of the estate for the fraudulent allowance and payment of the creditor's claim by the executor, thereby reducing the assets of the estate, to have the allowance set aside, and to permit the legatee and heirs to contest the claim.
Lancaster et al. v. Gould et al., 397
2. *Same.—Parties.*—The administrator of the estate of the executor (the executor having died after the commencement of the suit) is not a necessary party to such action. *Ib.*
3. *Same.—Allowance by Executor.*—An executor may allow a claim against the estate of his testator, if found to be correct, though the claim be not made out in an itemized form. *Ib.*
4. *Administrator.—Possession of Assets.*—An administrator has a claim superior to that of the heirs to the assets of the estate, until the debts of the estate have been paid.
Bearss et al. v. Montgomery, Guard., 544

DEFAULT.

See PRACTICE, 9.

DELIVERY BOND.

See ATTACHMENT, 5, 6, 7.

Reformation of.—In an action on a delivery bond, where the bond is made payable to the constable who has levied the execution, instead of to the execution plaintiff, and the bond shows that the execution was levied in favor of the plaintiff, the mistake, as a clerical error, may be corrected, and the bond reformed by making the execution plaintiff the obligee thereof.

Bell et al. v. Tangney et al., 49

DEMAND.

See PRINCIPAL AND AGENT, 2, 3.

DEMURRER.

See PARTIES, 1, 2; PLEADING, 6, 9, 10, 14, 15, 16, 22; PRACTICE, 15; SUPREME COURT, 8, 12; WILL, 5.

1. *Join: Demurrer.*—A demurrer must be well taken as to all those uniting in it, otherwise it should be overruled as to all of them.

Shore v. Taylor, 345

- 2. Presumption.—Plaintiff Suing by Guardian.**—Where a complaint shows that one of the plaintiffs sues by a guardian, and the answer alleges that eight years prior to the filing of the complaint, the plaintiffs, being of full age and competent to contract, made a contract, etc., the court will not presume, on demurrer to the answer, that the plaintiff suing by guardian was insane or an infant at the time of making the contract set up in answer.

Moore v. Kerr et al., 468

- 3. Joint Demurrer.**—Where two or more parties unite in demurring to a pleading, if the demurrer is not well taken as to all of them, it must be overruled as to all.

Owen et al. v. Cooper, 524

DEPARTURE.

See PLEADING, 21, 22.

DEPOSITION.

See EVIDENCE, 5.

DESCENT.

See CONSTITUTIONAL LAW, 2.

Widow.—A. died, leaving a widow and one child, who inherited his real estate equally. The widow also died intestate, leaving said child by A. and other children by a former husband.

Held, that her portion of said real estate descended in equal shares to all her children.

McClanahan et al. v. Trafford et al., 410

DRAINING ASSOCIATION.

- 1. Corporation.—Individual Liability.**—Where a ditching association was organized under, though not in strict conformity to, the law therefor, by persons who had subscribed articles of association which contemplated the construction of a ditch upon which the plaintiff performed manual labor, such persons, having brought the company into existence and permitted it to exercise the functions of a corporation *de facto* under the law relative to such organizations, making the members individually liable for manual labor performed in constructing the ditches, could not deny the corporate existence of the company in an action to recover for such labor.

Shafer et al. v. Moriarty et al., 9

- 2. Same.—Joint Liability.—Abatement.**—The liability of the members of a ditching association for manual labor performed in the construction of a ditch contemplated by the articles of association is joint, and not several; and in an action to recover for such labor, instituted against part only of the members, a verified answer alleging that other persons, who are named, living and within the jurisdiction of the court, are members of the company and signers of the articles of association, is good on demurrer. *Ib.*

- 3. Same.—Primary Liability.**—The liability of the members of a ditching association for manual labor performed is primary, and it is no defence to an action against the members to recover for such labor, that the uncollected assessments upon lands for benefits accruing thereto by the construction of the work are sufficient to pay the indebtedness.

Ib.

EASEMENT.

See STREET.

ELECTION.

Contest of Election.—Affidavit.—In a proceeding to contest the election of a county officer, the grounds of contest must be verified by the affidavit of the contestor. If the affidavit is made by any person other than the contestor, the proceedings should be dismissed.

Holton v. Brown, 122

ESTOPPEL.

See CORPORATION, 3; WAY, 4.

EVIDENCE.

See BASTARDY, 2; BILL OF EXCEPTIONS, 1, 2, 5; CORPORATION, 4, 5, 6; CRIMINAL LAW, 1, 8, 9, 10, 22, 24, 25 to 28; FORGED INSTRUMENT, 2, 3, 4; INSTRUCTIONS TO JURY, 2, 12, 13; MALICIOUS PROSECUTION; NEW TRIAL, 1, 3, 8; PLEADING, 13; RECORD, 1; SPECIFIC PERFORMANCE; SUPREME COURT, 1 to 6, 10, 14; TURNPIKE, 7; VARIANCE; WITNESS.

1. *Admissions*.—Testimony of an admission by defendant, that he was willing to pay the claim sued on if he had not been sued on it, is inadmissible. *Brooks v. Riding*, 15
2. *Record of Deed*.—A record of a deed is proper evidence, and neither the original nor a certified copy thereof is required. *Patterson v. Dallas*, 48
3. *Cross-Examination*.—Where a witness upon examination in chief had testified that he had never done a certain act, it was error to refuse, on cross-examination, to allow the witness to answer the question whether at a certain time and place he did not state to a person named that he had done said act. *Pruitt v. Brockman et ux.*, 56
4. *Written Instrument*.—*Copy and Original*.—Where an original bill of lading is in the possession and under the control of the plaintiff, it is error to admit in evidence, on behalf of the plaintiff, a copy, or if admitted and it afterward appears that the original is in the hands of the plaintiff, the copy should be withdrawn. *Gimbel et al. v. Hufford et al.*, 125
5. *Same*.—*Deposition*.—It is proper for a witness, whose deposition is taken, to identify a written instrument, and attach a copy of it to the deposition, and such part of the deposition should not be suppressed, for the absence of the original may be accounted for, and the copy be rendered admissible. *Ib.*
6. *Harmless Error*.—A party cannot complain of the rejection of evidence offered, where the record shows that he has not been injured by its rejection. *The Indianapolis, etc., Co. v. Herkimer*, 142
7. *Same*.—When evidence is offered tending to prove only one of several facts necessary to a recovery, it is not error to reject it when no offer is made, either in connection with the rejected evidence or otherwise, to prove the other essential facts. *Ib.*
8. *Witness*.—*Impeachment*.—Where a witness, on cross-examination, denies having testified differently in another action where the same matter was in controversy, he cannot be contradicted by the bill of exceptions in the former action, which purports to contain the evidence given by the witness therein, he not being a party to the action in which such bill of exceptions was filed. *Glenn v. The State, ex rel. Clore*, 368
9. *Ground of Objection*.—The ground of objection to the admissibility of evidence should be pointed out to the court below, and stated in the bill of exceptions. *Fisher et al. v. Allison et ux.*, 593

EXECUTION.

See INJUNCTION, 10, 11.

4. *Motion for Leave to Issue Execution*.—*Pleading to Such Motion*.—Upon a motion for leave to issue execution upon a judgment after the lapse of ten years from its rendition, the judgment defendant may appear, and in answer to the motion plead payment or satisfaction of the judgment; but whether he appear or not, no execution can issue unless it be established by the oath of the judgment plaintiff, or other satisfactory proof, that the judgment or a part thereof remains unpaid. *Reeves et al. v. Plough*, 350

2. *Same.—Decision Doubted.*—The case of *Plough v. Reeves*, 33 Ind. 181, doubted, so far as it was held therein that, on a motion for leave to issue execution, no pleading was contemplated, and the hearing should be summary. *Ib.*
3. *Same.—Payment or Satisfaction of Judgment.*—Under an answer to a motion for leave to issue execution after the lapse of ten years, denying that the judgment is unpaid and pleading affirmatively that it has been paid and satisfied, the judgment defendant may show that it has been satisfied in consequence of the judgment plaintiff having received money on collaterals, or show that by negligence and failure to collect collaterals he has become chargeable with their amount. *Ib.*
4. *Pleading.—Former Adjudication.*—To a complaint by a judgment defendant, to have a judgment declared satisfied, it is a good answer on the part of the judgment plaintiff, that the same matters alleged in the complaint were set up in an answer to a motion for leave to issue execution on the judgment, and that such matters were in that proceeding adjudicated. *Ib.*

EXECUTOR.

See DECEDENTS' ESTATES.

FEES AND SALARIES.

See CONSTITUTIONAL LAW, 5, 6; COUNTY TREASURER, 1 to 4.

FINES.

See PRACTICE, 12.

FORGED INSTRUMENT.

1. *Action.—Relief from Forged Instrument.*—One whose name has been forged to a negotiable instrument may maintain an action against an indorsee of such instrument to compel a surrender of the forged instrument or a release therefrom; and in such action, the court may render a judgment releasing the person whose name is forged from all liability, and, as to him, declaring the instrument void. *Huston v. Schindler*, 38
2. *Evidence.—Comparison of Handwriting by Jury.*—Papers having no connection with the cause, though conceded to be genuine, ought not to be submitted to the jury for comparison with the signature alleged to be forged. *Ib.*
3. *Same.—Comparison of Handwriting by Experts.*—Such papers, together with the signature alleged to be forged, may be submitted to experts, for the purpose of comparison by them, and that they may give to the jury an opinion based upon such comparison. *Ib.*
4. *Same.—Forged Signature Submitted to Jury.*—It is proper to submit to the jury, in connection with evidence bearing upon the genuineness of the signature in question, the paper bearing such controverted signature. *Ib.*

FRAUD.

See CONTRACT, 2; TURNPIKE, 6.

1. *Vendor and Purchaser.—False Representations.—Knowledge.*—Where a vendor, to induce the vendee to purchase a certain lot of ground, represented to him that the lot was the ground inclosed by a certain fence, which ground was examined by the vendee and had long been known to him; when the fact, unknown to the vendor and vendee, was, that the fence inclosed five feet in width of a street and as many feet less than the frontage so represented by the vendor; *Held*, that, in an action for the purchase-money, the vendee might defend as to so much of the price as was agreed to be paid for the five feet in width of the street so inclosed. *Brooks v. Riding*, 15

2. *Pleading.—Fraudulent Representations.*—A complaint to rescind a contract of sale of certain real estate, showing that the defendant fraudulently represented that he had purchased said real estate at a sale by an administrator of an estate, for the purpose of inducing the plaintiff to buy the real estate of the defendant, which the plaintiff, relying on the representation, did buy, showing the representations to be false, etc., was held sufficient.
Dinwiddie v. Kelley, 392
Ib.
3. *Parties.*—In such action, the widow and children of the decedent, whose estate it had been represented had been bought by the defendant, were not necessary parties.
Ib.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GARNISHMENT.

See ATTACHMENT, 1 to 4.

GRAND JURY.

See CRIMINAL LAW, 11, 29, 30.

GROWING TREES.

See LICENSE, 3; STATUTE OF FRAUDS, 1, 2.

GUARANTY.

1. *Promissory Note.—Extension of Time to Maker.*—An answer by a guarantor to a complaint on a note, that the payee extended the time of payment to the maker, is fatally defective if it does not show a definite time of extension and a consideration for the agreement to extend.
Sample et al. v. Martin, 226
Ib.
2. *Same.*—Parties who guarantee the payment of a promissory note by indorsing thereon and signing these words at the time of its execution, "We guarantee payment," are neither sureties nor indorsers, but guarantors, and they are not discharged by a failure to use diligence to collect the note of the maker; nor can they require the holder to sue the maker, as provided by statute in case of sureties.
Ib.

GUARDIAN AND WARD.

See DEMURRER, 2; PLEADING, 20, 21.

1. *Surety.—County Clerk.*—The statute not having made it one of the duties of the county clerk to receive money due a ward from a guardian, upon the settlement of the guardianship, though deposited with the clerk by order of the court, the guardian and the surety on his bond are liable to the ward, if the clerk converts to his own use money so deposited.
The State, ex rel. Roberts et ux., v. Fleming et al., 206
2. *Marriage of Infant Female.—Decedents' Estates.*—An infant female when married to a man of full age can have no guardian, and she may receive her estate from her guardian, and may also receive her distributive share of her father's estate, with the assent of her husband.
The State, ex rel. Hudson, v. Joest et al., 235
Ib.
3. *Same.*—A payment made to the husband by such administrator or guardian, with her assent and by her direction, is good as to her.
Ib.
4. *Same.*—If both the husband and wife are infants, such payments will not be good.
Ib.
5. *Same.*—If such payments have been made while both the husband and wife were infants, the money so paid need not be tendered back before suit is brought by the wife to recover the same of such guardian or administrator.
Ib.

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6. Removal of Guardian.—Practice.—Appeal.—Pending a petition to remove the guardian of an insane person, on the ground that he had taken his ward to a neighboring state and was there keeping him, an order was made that such guardian should bring his ward within the jurisdiction of the court by a day fixed. Having failed to perform the order, a rule was entered at a subsequent term requiring the guardian to show cause why he should not be attached. To this he presented an answer, to which exceptions were filed and submitted. Without deciding the exceptions, the court summarily removed the guardian, and refused an application on his part to file an answer to the petition for his removal and to introduce his evidence. The court also refused the guardian's prayer for an appeal and refused to fix the penalty of an appeal bond or the time within which it should be filed.

Held, that on the exceptions to the answer to the rule to show cause, etc., the question of the removal of the guardian was not before the court, and that it was error to pass over the exceptions and summarily remove him without allowing him to file an answer and introduce his evidence.

Held, also, that the order of removal was a final judgment from which an appeal lay to the Supreme Court.

Held, also, that the court erred in refusing an appeal, and also in refusing to fix the penalty of the appeal bond and the time within which it should be filed.

Ward, Guard., v. Angevine, 415

HIGHWAY.

See APPEAL, 1; WAY, 2.

HUSBAND AND WIFE.

See GUARDIAN AND WARD, 2 to 5; WITNESS.

1. Debts of Wife Contracted While Unmarried.—A wife is liable for her debts contracted *dum sola*, and the husband, though not liable as at the common law, is liable by statute on account of the property he may have received with or through the wife, and to the extent of its value; and in a suit against the husband in such a case, the wife should also be made a party defendant.

Shore v. Taylor, 345

2. Married Woman.—Failure to Plead Coverture.—If a married woman fails to make the defence of coverture to an action on her contract, and a judgment is rendered thereon, she is bound by the judgment.

Landers et al. v. Douglas et ux., 522

INFANT.

See GUARDIAN AND WARD, 2 to 5; NEGLIGENCE, 4.

INJUNCTION.

See PLEADING, 16.

1. Collection of Judgment.—The collection of judgments on fines assessed for violations of a criminal statute cannot be enjoined on the ground that the judgments are void on their face, for want of jurisdiction of the court, because there were no valid affidavits upon which the prosecutions were based, because the judgments do not describe any offences against the laws of the State, or because the law for the violation of which the fines and judgments were rendered was repealed after the judgments were rendered.

Joseph v. Burk, 59

2. Motion to Dissolve Temporary Injunction.—Harmless Error.—The overruling of a motion to dissolve a temporary injunction, where no appeal is taken from the order overruling such motion, even if error, becomes harmless and presents no question for determination, after the cause has been tried and a perpetual injunction has been granted.

Board of Comm'rs of Clay Co. et al. v. Markle et al., 96

3. *Complaint.—Verification.*—No verification of a complaint is required to enable a court to grant a perpetual injunction on the final hearing of the cause. *Ib.*
4. *Right of Tax-Payers to Enjoin.*—Any tax-payer of the county may maintain an action to enjoin the county commissioners from doing illegal acts, and transcending their lawful powers, when the effect would be to impose upon such tax-payer an unlawful tax, or to increase his burden by taxation. *Ib.*
5. *Appeal.*—The fact that no appeal lies from a decision affords no ground for an injunction to restrain action under the judgment, or for setting it aside. *Ib.*
6. *Relocation of County-Seat.*—When the board of commissioners have made an order relocating the county-seat, under the statute, they cannot be enjoined from letting a contract for the construction of new county buildings, on the ground that the architect has not made a plan and estimates for a jail, and that none are on file in the auditor's office, or that the plan for the courthouse is imperfect, and that the estimated cost of the same is more than fifteen thousand dollars. *Ib.*
7. *Trial by Jury.—Restraining Order or Temporary Injunction.*—In an application for a restraining order or temporary injunction, no jury trial is contemplated. *Hopkins et al. v. The Greensburg, etc., Co. et al.*, 187
8. *Same.—Perpetual Injunction.*—On the trial of an action for a perpetual injunction, where issues of fact are joined, the parties, or either of them, are entitled to a trial by jury. *Ib.*
9. *Judgment.*—The remedy by injunction lies to prevent proceedings on a satisfied judgment, or where the amount due has been tendered to and refused by the judgment plaintiff. *Bowen et al. v. Clark*, 405
10. *Execution.—Property Subject to Execution.*—An injunction will not be granted to restrain a sheriff from selling property sold by an execution defendant after the issuing of the execution, on the ground that the sheriff since the sale has wrongfully permitted the execution defendant to remove from the State and sell other property subject to the lien of the execution. *Sidener v. White et al.*, 538
- II. *Same.*—An injunction will be granted to restrain a sheriff from selling property sold by an execution defendant after the issuing of the execution, until other property of the defendant subject to execution shall be exhausted. *Ib.*

INJURY TO PERSON.

See STATUTE OF LIMITATIONS.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 6, 7, 26; NEW TRIAL, 2.

1. It is not error to refuse instructions proper in themselves, if the same matter is substantially embraced in other instructions given by the court. *Rogers v. Rogers et ux.*, I
2. *Evidence of Trivial Statements.*—Where there is no evidence of declarations lightly made in a trivial way, it is error to instruct a jury that declarations lightly made in a trivial way, by a party, without his attention being called to the subject-matter, form a very weak class of testimony. *Gimbel et al. v. Hufford et al.*, 125
3. *Instructions Given Made Part of Record.*—Instructions given by the court cannot be made a part of the record, or any question thereon be presented, by merely indorsing thereon, "given and excepted to," signed by the attorneys, when such instructions are not also signed by the judge. *Etter et al. v. Armstrong et al.*, 197
4. *Instructions Refused Made Part of Record.*—When instructions asked are

signed by the party or his attorney, refused by the court, and noted as refused and excepted to, signed by the party or his attorney, they become a part of the record, without the signature of the judge. *Ib.*

5. *Failure to Instruct Fully.*—If in any case it would be an available error that the court did not fully instruct the jury when not requested to do so, that point does not arise where the record fails to show that the court did not fully instruct them. *Hamilton v. Elkins*, 213

6. *Bill of Exceptions.—Instructions Given.*—Where instructions given are not included in any bill of exceptions or signed by the judge, though copied by the clerk in connection with the reasons for a new trial, they are not before the Supreme Court for any purpose.

The T. H. & I. R. R. Co. v. Graham, 239

7. *Same.—Instructions Refused.*—Where instructions refused are copied by the clerk in connection with the reasons for a new trial, but are not in a bill of exceptions and are not signed by anybody, and it is not noted upon them by counsel that they were refused and excepted to, they are not in the record. *Ib.*

8. *Inference of Law.*—Where instructions are signed by the judge and copied in the transcript, with the exceptions properly noted by counsel, it will be inferred that they were filed with the clerk, as contemplated by the statute. *Detrick v. McGlone et al.*, 291

9. *Presumed to be Correct.*—If, under any supposable state of the evidence, instructions given could have been correct, it will be presumed, the evidence not being in the record, that such evidence was given.

The Aurora, etc., Co. v. Johnson, 315

10. *Record.*—Copying instructions given into a motion for a new trial will not make them a part of the record. *Ib.*

11. *How Made Part of Record.*—An exception noted to the giving of an instruction at the end thereof and signed by the party excepting, or his attorney, is sufficient to make the instruction and exception a part of the record. *Ib.*

12. *Evidence.*—Where the evidence is not in the record, if upon any supposable state of facts the instructions given to the jury would be correct, the existence of such facts will be presumed by the Supreme Court on appeal.

Barlow v. Thompson et al., 384

13. *Same.*—Where the evidence is not in the record, but instructions are shown to have been given to the jury that are clearly erroneous under any supposable state of facts, the judgment will be reversed.

Smathers v. The State, 447

14. *Oral and Written.*—Instructions may be given either orally or in writing, when the court is not requested to give them in writing.

Fisher et al. v. Allison et ux., 593

15. *Bill of Exceptions.*—The giving or refusing to give instructions must be excepted to, and must be presented on appeal by bill of exceptions, or by exceptions noted as required by the statute. *Ib.*

INSURANCE.

1. *Foreign Insurance Company.—Principal and Agent.—Statements of Agent.*—In an action against a foreign insurance company to recover money paid as a premium on a void policy, the declarations of the agent made after the transaction, stating that he was the agent of the defendant, that as such agent he had not, at the time the policy was issued, filed the certificate with the county auditor as required by the statute, but that afterward one was filed, and that he was the general agent of the company, and as such countersigned the policy, were inadmissible as evidence against the insurance company. *The U. C. L. Ins. Co. et al. v. Thomas*, 44

2. *Same.—Effect of Non-Compliance with Statute.*—The prohibition against for-

eign insurance companies doing business in this State without compliance with the statute, extends to the company as well as to the agent of the company, and a contract evidenced by a policy issued without such compliance is invalid. *Ib.*

3. *Complaint on Insurance Policy.—Description of Property.*—A complaint on a policy of insurance need not be more specific than the policy in the description of the property insured. *The Aurora, etc., Co. v. Johnson*, 315
4. *Same.—Interest in Property Insured.*—A complaint upon a policy of insurance should allege that the assured had an interest in the property insured, and to what amount, at the commencement of the risk and at the time of the loss, but it is not necessary to state the plaintiff's title to, or ownership in, the property. *Ib.*
5. *Damage of Plaintiff.*—Where a schedule filed with a complaint on a policy of insurance sets out the items destroyed by fire and the value of each, as well as the aggregate value, the complaint will sufficiently show that the plaintiff has been damaged. *Ib.*
6. *Open Policy.—Over-Valuation.*—In an open policy of insurance, an over-valuation of the property insured is immaterial. *Ib.*
7. *Answer.—Fraudulent Statement of Loss.*—An answer to a suit on an insurance policy, that the plaintiff fraudulently stated the amount of loss to be greater than it was, without showing that the statement was made to the insurance company or its agent, or in any transaction in relation to the loss, is bad. *Ib.*
8. *Same.—Permitting Loss.*—So, also, an answer alleging that the plaintiff negligently stood by and permitted the property to be consumed, and made no reasonable exertion to prevent the fire or save the insured property, is bad where it is not averred that it was within his power to have prevented the fire or loss of the property. *Ib.*
9. *Inspection of Books and Papers.*—Where the conditions of a policy of insurance require the insured, in case of loss, to produce his books of account and other vouchers in support of his claim, and permit copies and extracts thereof to be made, whenever required in writing, an answer alleging a refusal to produce them, without alleging a request in writing, is bad. *Ib.*
10. *Examination Under Oath.*—Where a policy of insurance makes it the duty of the insured in case of loss to submit to an examination under oath by the agent or attorney of the insurance company, an answer alleging generally a refusal to submit to an examination, without showing when or by whom the request was made, or that a time or place was named for such examination, is bad. *Ib.*
11. *Reply.*—Where an answer to a suit on a policy of insurance covering materials and machinery used in manufacturing tobacco alleges that the risk had been materially increased by using the third story of the building occupied as a store-room for old boxes, casks, and rubbish, a reply that the boxes, etc., were used and were necessary materials in the business, and constituted a part of the risk insured against, is good. *Ib.*
12. *Excuse for not Producing Books.*—Where an answer to a suit on a policy of insurance alleges a failure on the part of the insured to produce his books and bills of purchases, etc., a reply that they were destroyed by fire shows a good excuse. *Ib.*
13. *Foreign Insurance Company.—Certificate of Nearest Magistrate.—Statute.*—By the sixth section of the act of December 21st, 1865, 3 Ind. Stat. 315, a foreign insurance company cannot require a certificate of loss to be certified by the nearest magistrate. *Ib.*

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Pleading.—Complaint for Review.—A complaint to review a judgment on the ground that there was no appearance, answer, or default of the defendant seeking to have the judgment reviewed is bad if the record shows that there was an appearance and that an answer was filed. *Bush v. Bush*, 70

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1. *Superior and Inferior Courts.—Intendment.*—Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.

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2. *Decision of Inferior Court on Jurisdictional Fact.—Conclusive.*—When the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive.

Ib.

3. *Relocation of County-Seat.—Petition for Relocation.*—The act of February 24th, 1869, 3 Ind. Stat. 171, in reference to the relocation of county-seats, does not require that it shall be stated in the petition that the requisite number of voters have signed it; but it must contain the requisite number, and the deed must be executed, conveying a good title to two sites for a courthouse and jail, and the two hundred and fifty dollars must be paid, before the order for relocation can be made or the new county buildings erected.

Ib.

4. *Same.—Board of Commissioners.*—The board of commissioners can not decide upon the petition, or the number of legal voters petitioning, until it is presented, or upon the title to the land until the conveyance has been executed and delivered or offered, or whether the petitioners have deposited the requisite sum of money, until it has been paid or offered to the board. When these things have been done, the board must ascertain and determine these questions, and the right to hear and determine these questions is jurisdiction.

Ib.

5. *Same.—Legal Presumptions.*—The board of commissioners having acquired jurisdiction to hear and determine the matter of the petition and all questions arising under it, the Supreme Court must presume in favor of the regularity of the proceedings, and that whatever was done in deciding questions arising in the case, and in acting upon them, was done regularly and upon due proof, unless the contrary appears in the record.

Ib.

6. *Jurisdictional Facts.*—The facts which must be shown to exist before a matter can be within the jurisdiction of an inferior court, and which can be inquired into collaterally, are such that in the absence of them the court can not rightfully hear and determine any question touching the matter in controversy.

Ib.

7. *Same.*—Whenever it is admitted, either in the pleadings or otherwise, or shown by proof, that such facts did exist, that the proper steps had been taken, such as the filing of an affidavit, petition, or other papers, authorizing the court to act, to make an investigation and decision, then the jurisdictional facts exist.

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JUSTICE OF THE PEACE.

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1. *Coroner.*—When the coroner is absent from the county, or unable to attend, a justice of the peace may hold an inquest, and, in doing so, has all the power and can perform all the duties pertaining to the office of coroner. *Stevens v. The Board of Comm'rs of Harrison Co.*, 541
2. *Same.—Post Mortem Examination.—Physician.*—When a justice of the peace, acting as coroner, requests a physician to make an examination of the body over which an inquest is being held, and he makes an examination, and the justice so certifies to the county commissioners, the physician will be entitled to an allowance. *Ib.*

LARCENY.

See CRIMINAL LAW, 21, 22, 24.

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See TOWN.

1. *Trespass.*—A parol license to enter on lands will excuse what would otherwise be a trespass. *Owens v. Lewis*, 488
2. *Revocation.*—A license confers only a privilege, and does not pass an estate, and may be revoked or countermanded at any time by the licensor. *Ib.*
3. *Same.—Parol Agreement for Sale of Growing Trees.*—A parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee, will amount to a license for the vendee to enter upon the vendor's land for the purpose of making such severance; and if the license be not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license after such severance will become coupled with an interest and irrevocable, and the vendee will have a right to enter and remove the trees thus severed; but if, before the trees are severed, the vendor should revoke such license, no title will pass to the vendee, and no rights will vest by virtue of such parol agreement. *Ib.*

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ib.

5. *Same.—Legal Presumptions.—The board of commissioners having acquired jurisdiction to hear and determine the matter of the petition and all questions arising under it, the Supreme Court must presume in favor of the regularity of the proceedings, and that whatever was done in deciding questions arising in the case, and in acting upon them, was done regularly and upon due proof, unless the contrary appears in the record.*

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7. *Same.—Whenever it is admitted, either in the pleadings or otherwise, or shown by proof, that such facts did exist, that the proper steps had been taken, such as the filing of an affidavit, petition, or other papers, authorizing the court to act, to make an investigation and decision, then the jurisdictional facts exist.*

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1. *Coroner.*—When the coroner is absent from the county, or unable to attend, a justice of the peace may hold an inquest, and, in doing so, has all the power and can perform all the duties pertaining to the office of coroner. *Stevens v. The Board of Comm'rs of Harrison Co., 541*
2. *Same.—Post Mortem Examination.—Physician.*—When a justice of the peace, acting as coroner, requests a physician to make an examination of the body over which an inquest is being held, and he makes an examination, and the justice so certifies to the county commissioners, the physician will be entitled to an allowance. *Ib.*

LARCENY.

See CRIMINAL LAW, 21, 22, 24.

LICENSE.

See TOWN.

1. *Trespass.*—A parol license to enter on lands will excuse what would otherwise be a trespass. *Owens v. Lewis, 488*
2. *Revocation.*—A license confers only a privilege, and does not pass an estate, and may be revoked or countermanded at any time by the licensor. *Ib.*
3. *Same.—Parol Agreement for Sale of Growing Trees.*—A parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee, will amount to a license for the vendee to enter upon the vendor's land for the purpose of making such severance; and if the license be not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license after such severance will become coupled with an interest and irrevocable, and the vendee will have a right to enter and remove the trees thus severed; but if, before the trees are severed, the vendor should revoke such license, no title will pass to the vendee, and no rights will vest by virtue of such parol agreement. *Ib.*

LIEN.

See MECHANIC'S LIEN; WATER CRAFTS.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LIQUOR LAW.

See TOWN; SALE TO MINOR; See ZELLER *v.* THE STATE, 304.

1. *Indictment.—Selling Liquor to Person in the Habit of Getting Intoxicated.—*

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An indictment for selling intoxicating liquor to a person in the habit of getting intoxicated need not name the kind of liquor sold.

Connell v. The State, 446

2. *Same*.—The use in the indictment of the word "being" instead of the word "getting," used in the statute defining the offence, will not render the indictment bad.

ib.

MALICIOUS PROSECUTION.

Evidence.—Defendant's Knowledge of Plaintiff's Character.—In an action for malicious prosecution of the plaintiff on a charge of crime, it is competent for the plaintiff to introduce evidence to show that before and at the time of the prosecution complained of, he was a man of good moral character and reputation in the community in which he lived, and that the defendant had knowledge of this, as tending to show a want of probable cause.

Blissard v. Hays, 166

MALICIOUS TRESPASS.

See VARIANCE.

MANSLAUGHTER.

See CRIMINAL LAW, 15 to 18.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MECHANIC'S LIEN.

1. *Personal Liability.—Notice to Building Committee of City Council*.—A notice to the members of a building committee of the common council of a city, that the persons giving the notice have filed a lien on a building being constructed by the city under the supervision of the committee, and that said members will be held liable to a certain amount for brick furnished for said building, will fix no personal liability on the city.

The City of Crawfordsville v. Irwin et al., 438

2. *Same.—Defect in Notice*.—Such personal notice must show to whom the materials have been sold.

ib.

3. *Complaint on Mechanic's Lien*.—A complaint to enforce a mechanic's lien must show that the notice of lien was filed within sixty days after the completion of the building. An averment that the notice was filed within sixty days after the money was to have been paid is insufficient.

ib.

4. *Uncertainty in Notice*.—Notice of an intention to hold a mechanic's lien on a part of lot No. 110, and the improvements thereon, in the original plat of a city named, is radically defective for uncertainty in the description.

ib.

5. *Complaint*.—A complaint to enforce a mechanic's lien for materials furnished to the contractor must show the amount due. An averment that a notice of lien to a certain amount was filed is not equivalent to an averment that that or any other amount was due.

ib.

MISTAKE.

See DELIVERY BOND.

1. *Mortgage.—Judgment Creditor of Mortgagor*.—A mortgagee cannot have his mortgage reformed and corrected on the ground of a mistake in describing the real estate, so as to make the mortgage cover another and different tract of land than that described therein, as against a judgment creditor who has purchased in good faith, for a valuable consideration, judgments rendered against the mortgagor after the execution of the mortgage.

Flanders v. O'Brien, 284

2. *Complaint to Correct Mistake.*—A complaint to correct a written contract on the ground of a mistake, and to enforce it, wherein it is averred, in a very general and indefinite way, that by the mistake, inadvertence, or neglect of the scrivener drawing it up, and without any fault of the plaintiff, the contract does not fully set forth the agreement of the parties, without showing in what respect or particular it fails to set forth the agreement, what words are omitted that it was agreed should be inserted, or what words are inserted contrary to the intention of the parties, is bad.
Baldwin et al. v. Kerlin et al., 420
3. *Same.*—A mistake that can be corrected in such case must have been a mutual mistake of fact. It is not enough that one of the parties was mistaken.
Ib.

MORTGAGE.

See MISTAKE, I.

1. *Chattel Mortgage.—Possession of Mortgaged Property.*—The principle of the common law prevails, unchanged by the statutes of this State, that where a mortgage of personal property is silent as to possession, the mortgagor is entitled to immediate possession upon the execution of the mortgage.
Broadhead v. McKay, 595
2. *Same.—Statute.*—The provision of the statute (2 G. & H. 355, sec. 1,) that "unless a mortgage specially provides that the mortgagor shall have possession of the mortgaged premises, he shall not be entitled to the same," applies to mortgages of real estate, and not of personal property.
Ib.
3. *Same.—Sale of Mortgagor's Interest on Execution.*—Sec. 436, 2 G. & H. 240, which provides that the interest of the mortgagor of goods may be sold on execution, does not give the purchaser the right of possession, except upon his compliance with the conditions of the mortgage.
Ib.
4. *Same.—Foreclosure.*—Though an action to foreclose a chattel mortgage will lie, to enforce the lien and extinguish the equity of redemption of the mortgagor, yet the mortgagor may take possession and sell without foreclosing.
Ib.

NAME.

See PLEADING, 14; VARIANCE.

NEGLIGENCE.

See PRINCIPAL AND AGENT, 1; RAILROAD, 3.

1. *Pleading.—Answer.*—In an action to recover for an injury alleged to have been caused by the negligence of the defendant, the complaint must allege that the injury resulted without any negligence on the part of the plaintiff contributing thereto, and an answer alleging facts showing that the negligence of the plaintiff contributed to the injury, or facts showing that the injury was caused solely by the plaintiff's negligence, is sufficient on demurral, though unnecessary where the general denial is pleaded.
Hathaway v. The T. W. & W. R. W. Co., 25
2. *Contributory Negligence.*—In all cases, where ordinary negligence on the part of the defendant is sufficient to infer liability, it is a sufficient defence to show that there was contributory negligence on the part of the plaintiff.
Ib.
3. *Same.*—In such a case it is a sufficient defence to show that although the negligence of the defendant was a cause, and even the primary cause of the occurrence, yet the occurrence would not have happened without a certain degree of blamable negligence on the part of the plaintiff.
Ib.
4. *Same.—Infant Plaintiff.*—These rules apply where a child is the plaintiff, whether the fault is that of the child or the negligence of the person having the care of the child.
Ib.

NEW TRIAL.

See SUPERIOR COURT, 2; SUPREME COURT, 9.

1. *Evidence*.—A motion for a new trial on the ground of the admission of incompetent testimony must point out the particular evidence objected to. It is not sufficient to refer to it as the evidence shown by the bill of exceptions to have been objected to, especially when the bill of exceptions has not been filed. *Rogers v. Rogers et ux.*, I
2. *Instructions*.—One cause alleged for a new trial was, that the court gave erroneous instructions to the jury; another, that the jury disregarded the instructions of the court.
Held, that the objections were too general. The particular instructions objected to should have been pointed out.
Held, also, that the complaining party could not have been injured in consequence of the disregard by the jury of erroneous instructions. *ib.*
3. *Motion*.—That the court erred in rejecting evidence, or that the court erred in admitting evidence, is too general a statement of a reason for a new trial. *Fox v. The Allensville, etc., Co.*, 31
4. *Surprise*.—It is not sufficient cause for granting a new trial on motion of the defendant on the ground of surprise, that the attorney for defendant, by reason of necessary work to be done in completing his dwelling-house and his supposition that the cause would not be called for trial, neglected to attend the trial, and that on the trial in the absence of the defendant, testimony was given that a horse, the value of which was in question, was worth more than he was really worth. *Bell et al. v. Tangy et al.*, 31
5. *Statements in Motion*.—Statements in a motion for a new trial cannot be taken as true, like those in a bill of exceptions. *Hopkins et al. v. The Greensburg, etc., Co. et al.*, 187
6. *Causes*.—Neither a ruling on a demurrer to a pleading nor a ruling on a motion to strike out such pleading can be a ground for a new trial. *Hamilton v. Elkins*, 213
7. *Motion*.—*Reference to Bill of Exceptions*.—Supposed errors of law occurring at the trial must be particularly stated in the motion for a new trial. The requisite particularity cannot be supplied by reference to a bill of exceptions to be thereafter made. *Shore v. Taylor*, 345
8. *Reasons for New Trial*.—Assigning as a cause, in a motion for a new trial, the refusal of the court to admit certain evidence “as shown in the bill of exceptions,” when at the time of the motion there is no bill of exceptions, is insufficient. *Murphy v. Wilson et al.*, 537
9. *Same*.—That the finding and judgment of the court should have been for the defendant instead of for the plaintiff, is not, in form, one of the statutory reasons for a new trial. *Specht et al. v. Williamson et al.*, 599

NUNC PRO TUNC.

See PRACTICE, 1; SUPREME COURT, 7.

Nunc Pro Tunc Entry.—A *nunc pro tunc* entry is made as of the time the proceedings of the court actually took place, and becomes a part of the entry of that date, the same as if entered then. *Bush v. Bush*, 70

OFFICIAL BOND.

See COUNTY CLERK; GUARDIAN AND WARD, I.

OFFICE AND OFFICER.

1. *Township Trustee*.—*Vacancy*.—The facts that a township trustee, who was a candidate for re-election, and the opposing candidate, each received at the election an equal number of votes, and the trustee neglected or fraudu-

lently refused to discharge the duties required of him by law in case of a tie vote, did not create a vacancy in the office or authorize the county auditor to make an appointment to fill such office.

The State, ex rel. Clifford, v. McMullen, 307

2. *Judge.—Prosecuting Attorney.*—Judges of circuit courts and prosecuting attorneys are not state, county, or township officers.

The State, ex rel. Pitman, v. Tucker, 355

PARTIES.

See DECEDENTS' ESTATES, 2; FRAUD, 3; PARTNERSHIP, 1; PLEADING, 14; TRUST AND TRUSTEE.

1. *Defect of Parties.—Demurrer.*—A demurrer for defect of parties defendants lies only where a necessary party is not made a defendant, not because there are too many defendants.

Hill et al. v. Marsh et al., 218

2. *Same.*—An objection for a defect of parties defendants must be taken by demurrer or answer, or it will be considered as waived.

Shore v. Taylor, 345

3. *Review of Judgment.—Parties.*—A person who is not a party to an action, or an heir, devisee, or personal representative of a deceased party, or otherwise in privity, cannot be affected by the judgment therein, and cannot sustain a proceeding to review the judgment.

Owen et al. v. Cooper, 524

PARTITION.

1. *Pleading.—Answer.*—Complaint for the partition of real estate. Answer, that the plaintiffs and the defendant, being of full age, entered into a parol contract by which each selected a disinterested person to make partition of the land; that the persons so selected made partition, and the parties then had the land which was set off to each surveyed and the lines established; that each then took possession of the respective parts so set off, and had the same transferred on the tax duplicate, and had so held possession for eight years; and that the defendant had made lasting and valuable improvements on the part set off to him; and asking that a commissioner be appointed to make deeds, &c., and that the defendant's title be quieted.

Held, that this was a good answer in bar.

Moore v. Kerr et al., 468

2. *Same.*—It was not necessary that the answer should allege an offer of the defendant to make a deed to the plaintiffs, or show a demand upon the plaintiffs for a deed.

Ib.

3. *Partition by Parol.*—A parol partition made by tenants in common is valid, where possession is taken and held in pursuance of such partition.

Ib.

PARTNERSHIP.

See PLEADING, 13.

1. *Parties.*—Where a demand exists in favor of a partnership, and one of the partners refuses to join in an action for its enforcement, he may be made a defendant with the partnership debtor, in a suit brought by his co-partner.

Hill et al. v. Marsh et al., 218

2. *Measure of Relief.—Judgment.*—In such case, where the defendant-partner filed an answer alleging that he had no knowledge of a claim by the partnership against his co-defendant, but averring that if it existed he was entitled to one-half thereof, and praying that judgment for his half might not be rendered in plaintiff's favor, it was error to render judgment in his favor against his co-defendant for one-half the sum found due to the partnership. To entitle himself to such judgment, he must have filed a cross complaint asking affirmative relief. The answer made no issue between him and the other defendant.

Ib.

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PAYMENT.

See COUNTY TREASURER, 2, 3, 4; TOWN.

1. Circumstances from which payment may be inferred discussed.
Bowen et al. v. Clark, 405
2. *Voluntary.—Illegal Demand.*—If an individual pays an illegal demand made against him, without legal compulsion, with a full knowledge of the facts, and without fraud or imposition, he cannot reclaim it.
The Town of Ligonier v. Ackerman, 552
3. *Compulsory.*—A mere apprehension of legal proceedings is not sufficient to make a payment compulsory; and where there is a threatened prosecution, the payment must be made under protest, in order to entitle the party to reclaim it.
Ib.

PLEADING.

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1. *Action on Note and Mortgage.—Answer.*—To an action on a note and mortgage, an answer that the note was given for a stock of goods bought of the plaintiff, and that numerous articles mentioned in the invoice were not in the possession of the plaintiff at the time the invoice was made, and have never been delivered to the defendant, presents no defence in whole or in part.
Bacon v. Markley, 116
2. *Demurrer.*—It is error to overrule a demurrer to a special paragraph of a reply, if the facts are not sufficient to bar the answer, though proof of the facts might be admissible under the general issue pleaded.
Kernodle v. Caldwell, Adm'r, 153
3. *Partial Reply.*—A paragraph of reply which professes to reply to the whole answer, but which is a reply to only a part of the answer, cannot be sustained.
Ib.
4. *Complaint.*—A complaint or paragraph of a complaint must show a cause of action in favor of all who are joined as plaintiffs.
Griffin v. Kemp et al., 172
5. *Complaint on Check.—Answer of Set-Off.*—To a complaint by a husband and wife, on a check payable to A. & Co., wherein it is alleged that the wife is in business with other parties, under the firm name of A. & Co., but that the check is her individual property, in which the other members of the firm have no interest, and that it was drawn payable to A. & Co. by mistake, an answer in the form of a cross bill, alleging that the check was given for certain notes bought of A. & Co., and represented by the plaintiffs to be the property of A. & Co., which notes were indorsed to the defendant in the name of A. & Co., and claiming to set off the amount of a note made by A. & Co., and held by the defendant, is good.
Ib.
6. *Joint Demurrer.*—Where a demurrer is joint to all the paragraphs of an answer, if one paragraph is good, the demurrer should be overruled.
Ib.
7. *Representations.—Warranty.*—If property be sold to several persons under representation and warranty that it is of a certain quality and value, and a part only of the purchasers give a note for the price of the property, the latter, when sued upon the note, may set up, by way of answer, that the property for which the note was given was not of the quality or value represented and warranted.
Gordon et al. v. Swift, 208
8. *Set-Off.—Mutuality.*—Two of three defendants in an action on a promissory note pleaded a set-off.
Held, that the answer was bad.
Ib.

9. *Demurrer.*—It is not error to sustain a demurrer to a special paragraph of an answer when it puts in issue nothing not also in issue by the general denial.
DeHaven et al. v. DeHaven et al., 296
10. *Same.*—It is not error to sustain a demurrer to a paragraph of answer, when the same facts are admissible in evidence under another paragraph upon which issue is joined.
The Aurora, etc., Co. v. Johnson, 315
11. *Failure of Consideration.*—*Answer.*—To a suit upon a promissory note for three hundred and fifty-five dollars, an answer alleging that it was given in part payment for a saw and saw-mill, represented to be sound and perfect, and claiming a failure of consideration on account of a latent defect in pulley tighteners, of the value of fifteen dollars, causing them to break, and by breaking, to destroy and injure other parts of the machinery to the value of three hundred and eighty-five dollars, but not showing that the pulley tighteners were a part of the mill purchased, and that they broke and caused the injury complained of without the fault of the defendant, was held bad.
Lane et al. v. Whitehouse, 389
12. *Answer in Bar of One Plaintiff.*—Where there are two or more plaintiffs, an answer in bar generally, but setting up matter in bar of only one of the plaintiffs, is bad.
Lancaster et al. v. Gould et al., 397
13. *Evidence.*—In an action between parties who had been partners, involving partnership transactions, the defendant answered that the plaintiff had received certain moneys of the firm which he had converted to his own use. *Held*, that, under a general denial of such answer, the plaintiff might prove that the moneys so received by him had been expended for partnership purposes.
Hackney et al. v. Williams, 413
14. *Demurrer.—Plea in Abatement.*—If an objection to a complaint on account of an error in the name of the defendant can be raised by demurrer, it can only be done by assigning as a cause of demurrer a defect of parties defendants. But the proper remedy is by a plea in abatement.
Sinton et al. v. The Steamboat R. R. Roberts, 476
15. *Demurrer.*—A demurrer for want of sufficient facts will be overruled, if on the facts stated the plaintiff is entitled to any relief whatever, although not entitled to that demanded.
Owens v. Lewis, 488
16. *Same.—Trespass.—Injunction.*—A complaint alleging the commission of a trespass upon real estate, by cutting and carrying away timber, and alleging that an additional trespass is threatened and apprehended, and asking an injunction, is good on demurrer.
Ib.
17. *Complaint for Review.*—A complaint for review must bring before the court a record of the proceedings and judgment sought to be reviewed. A reference to the proceedings sought to be reviewed is insufficient.
Owen et al. v. Cooper, 524
18. *Cause of Action Perfected before Suit.*—A complaint by a party claiming an interest in real estate or the proceeds thereof, as heir of one taking an interest in the estate after the termination of a life estate, must show that the person in whom the life estate vested was dead before the commencement of the suit.
Ib.
19. *Complaint for Recovery of Money.*—A complaint that asks a judgment for an amount in money, as well as a review of a judgment, to which the plaintiff was not a party and by which he is not bound, may be sustained as a complaint for the recovery of money, though not good as a complaint for review.
Ib.
20. *Complaint by Guardian.*—When the guardian of an insane person sues in his own name, the complaint should show that the right of action is in the insane person, and should not allege the cause of action to be in the guardian.
Bearss et al. v. Montgomery, Guard., 544
21. *Same.—Reply.—Departure.*—When the guardian of an insane person sues upon a promissory note, and alleges in the complaint that the note was

indorsed to the plaintiff, a reply showing that the note was indorsed to the deceased ancestor of his ward, and that his ward's only claim to the note grows out of a division made by the heirs of the notes held by the deceased, is a departure.

16.

22. *Demurrer for Departure*.—A departure in pleading may be objected to by a demurrer.

16.

23. *Amended Complaint*.—Where an amended complaint is filed, covering all the matter contained in the original complaint and the amendments thereto, if any, the original complaint ceases to be a part of the record, and the answers which have been filed to it, if any, go out of the record with it.

Specht et al. v. Williamson et al., 599

PRACTICE.

See AMENDMENT; BILL OF EXCEPTIONS; COURT; CRIMINAL LAW, 12, 13, 14, 19, 20; GUARDIAN AND WARD, 6; INSTRUCTIONS TO JURY; NEW TRIAL; PARTIES; PRINCIPAL AND AGENT, 3; RECEIVER; SUPREME COURT.

1. *Nunc Pro Tunc Entry*.—*Appearance to Motion*.—Where a party has notice to appear to a motion to correct a record by an entry *nunc pro tunc*, and no objection is made to the notice in the court below, and the party appears to the motion, and the sufficiency of the notice is not tested by a motion to reject or strike out, no question is presented thereon for review.

Bush v. Bush, 70

2. *Commencement of Action*.—The filing of an amended complaint, after a demurrer has been sustained to the original, is not the commencement of the action.

16.

3. *Relief from Judgment Taken Through Mistake, etc.—Amendment*.—If proceedings to set aside a judgment, under section 99 of the code, as amended, are commenced within two years after the rendition of the judgment, the relief may be granted after the expiration of two years, and the pleadings are subject to amendment as in other cases.

16.

4. *Same.—Diligence*.—The doctrine applicable to fraud in contracts and judgments, in relation to the diligence that must be used in bringing the action, has no application to proceeding under section 99 of the code, as amended, to set aside a judgment.

16.

5. *Same.—Discretion of Court*.—Under section 99 of the code, as amended, where it is shown that the default was taken through mistake, inadvertence, surprise, or excusable neglect of the party applying for relief, the court has no discretion, but must grant relief.

16.

6. *Same.—Where the record of a cause shows that defendant was served with process, appeared by attorney, and by attorney joined with other defendants in an answer, and that there was a trial by jury, and a judgment and decree rendered on a finding of the jury, such party is not entitled to be relieved from such judgment on the ground of irregularity in the service of process, ignorance of the nature of the action, and that all of the proceedings were had and determined without his knowledge*.

16.

7. *Waiver of Reply*.—Where the record shows the filing of a demurrer to certain paragraphs of an answer, but does not show any ruling of the court thereon, or that any reply was filed, no question arises as to the sufficiency of the answer, and the presumption is that the defendant waived a reply.

The J., M. & I. R. R. Co. v. Irvin et al., 180

8. *Motion to Strike Out*.—A judgment will not generally be reversed because the court below has refused to strike out part of a pleading.

The T. H. & I. R. R. Co. v. Graham, 239

9. *Default*.—It is error to enter a default and render judgment against a defendant who has demurred to the complaint, while his demurrer remains undisposed of.

Kellenberger v. Perrin et al., 282

10. *Trial.—Separation of Witnesses.*—A judgment will not be reversed on account of a refusal to order a separation of witnesses.
Derrick v. McGlone et al., 291
11. *Failure to Reply.*—A failure to file a reply is no reason for the reversal of a judgment; the presumption is that it was waived.
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12. *Arrest of Judgment.—Fine.*—That a fine is assessed jointly against two defendants is no ground for arrest of judgment.
Lowe et al. v. The State, 305
13. *Change of Venue.—Time of Trial.*—Where a cause was pending in a common pleas court, and a change of venue was taken from the judge, the court had power to fix a time in vacation for the trial of said cause.
The Aurora, etc., Co. v. Johnson, 315
14. *Same.—Judge.*—Where a change of venue is taken from a judge of a court, and he sets the case down for trial before another judge, and the latter fails to appear, or, appearing, fails to finally dispose of the case, the action is not thereby discontinued, but continues by operation of law on the general docket of causes pending in such court, and the judge thereof may appoint another judge to try the cause.
Glenn v. The State, ex rel. Clore, 368
15. *Demurrer.—Next Friend.*—The fact that a complaint does not show that parties for whom one assumes to sue as next friend are infants, is not a ground of demurrer. Assuming that they are of age, the name of the next friend is unnecessary, and may be struck out on motion.
Lancaster et al. v. Gould et al., 397
16. *Motion to Strike Out.*—A refusal to strike surplus matter from a pleading does not, as a general rule, constitute an available error.
Ib.
17. *Amendment During Trial.*—When the court permits an amendment of a pleading after the trial has commenced, the jury need not be re-sworn unless such amendment changes the issue.
Hackney et al. v. Williams, 413
18. *Appeal from Judgment of Justice of the Peace after Thirty Days.*—A defendant who was personally served with process in a suit before a justice of the peace, and who suffered judgment to go against him by default, procured an order of the court of common pleas for an appeal more than thirty days after the rendition of the judgment. His affidavit showed that he paid the costs two days after judgment, and supposed the default had been set aside, and was waiting for the justice to fix a time for the trial of the cause; that he "had no other idea than defending the suit;" that the note on which judgment was rendered had been paid, and that he was not aware that the default had not been set aside until the day of making the affidavit.
Held, that the appeal was improperly granted and should have been dismissed. The payment of the costs did not of itself operate to vacate the judgment. That could only be done on the defendant's motion, and he made no motion to that effect before the justice.
Sample v. Gilbert, 444

PRESUMPTION.

See CRIMINAL LAW, 27, 33; DEMURRER, 2.

PRINCIPAL AND AGENT.

See INSURANCE, 1, 2; RAILROAD, 5.

1. *Negligence of Agent.*—Neglect and want of skill of an agent, by which the principal is wronged, will not entitle the principal to relief against a third person not guilty of any wrong in the matter.
Bacon v. Markley, 116
2. *Demand.*—In a complaint by a principal against his agent to recover money collected by the latter and not paid over, it is essential to aver a demand of payment before suit.
Heddens v. Younglove et al., 412
3. *Same.—Arrest of Judgment.*—When, in a suit by the principal against his agent for not paying over money collected, the complaint fails to allege a

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PRINCIPAL AND SURETY.

See COUNTY CLERK; GUARANTY, 2; GUARDIAN AND WARD, 1.

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See WAY, 1 to 4.

PROCESS.

See ATTACHMENT, 4; RAILROAD, 8.

PROCHEIN AML.

See PRACTICE, 15.

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1. *Negotiability of.*—All promissory notes are negotiable in this State by statute, but not as inland bills of exchange unless payable in a bank in this State; and in that case the note on its face must designate the particular bank in which it is payable. *Holloway v. Porter et al.*, 62 *Ib.*
2. *Same.*—The difference between negotiability merely, and negotiability as inland bills of exchange, discussed. *Ib.*
3. *Same.—Common Law.*—Promissory notes were not negotiable as inland bills by the common law, but were first made so negotiable by the statute of Anne. *Ib.*
4. *English Statutes.—What Adopted by this State.*—Chapter eighty-seven of the Revised Statutes, 1 G. & H. 415, adopts as the law of this State the common law of England and statutes in aid thereof of a general nature, etc., made by the British Parliament prior to the fourth year of James I. (A. D. 1607); but the statute of Anne relating to the negotiability of promissory notes was passed nearly one hundred years later, and was never in force here. *Ib.*
5. *Negotiability.*—A promissory note payable in a bank in this State is negotiable; if not so payable, it is assignable, but it is not commercial paper. *King v. Vance*, 246

PROSECUTING ATTORNEY.

See OFFICE AND OFFICER, 2.

RAILROAD.

1. *Complaint for Killing Live-Stock.*—A complaint before a justice of the peace against a railroad company for killing a cow belonging to the plaintiff charged that the animal was killed by a locomotive of the defendant, at a point where the railroad was by law required to be fenced, and where the same was not fenced. *Held*, that the complaint was sufficient. It was not necessary to aver that the animal went upon the track at a place where the road was not fenced; the reasonable inference from the averments of the complaint being, that the road was not securely fenced at the place where it went upon the track and was killed. *The O. & M. R. W. Co. v. Miller*, 215
2. *Killing Animals.—Statute.*—It is essential to the liability of a railroad company, under the acts of 1853 and 1863, for the death or injury of an animal, that the animal should be actually touched by the engine, cars, or other carriages. *The I. B. & W. R. W. Co. v. McBrown*, 229

3. *Same.—Negligence at Common Law.—Wilful Negligence.*—Where the track of a railroad passed through a cut eighty rods long, and a horse of the owner of the land was near the track at the entrance of the cut, and the whistle of an approaching engine was sounded, and the horse ran upon the track and into the cut, whence it could not escape up the sides, and the engine was run on and the whistle sounded, thereby continuing to frighten the horse until it jumped into a trestle-work at the other end of the cut and was killed, when the engine could have been stopped after the horse was in the cut and before it jumped into the trestle-work;
Held, that the company was guilty of such negligence as rendered it liable at common law for the value of the horse. The negligence in such case is *wilful.* *Ib.*
4. *Pleading.—Negligence.—Wilful Injury.*—A complaint against a railroad company alleging that the plaintiff was on the track of the defendant's road, and without any warning to him, and without any fault on his part, the locomotive was negligently run against him, etc., is substantially good. Such complaint is also good, if it is alleged that the defendant wilfully and purposely and with great force ran the locomotive against the plaintiff.
The T. H. & I. R. R. Co. v. Graham, 239
5. *Agents and Servants.—Line of Duty.—Wilful Acts.*—The agents and servants of a railroad company while engaged in running a train of cars are in the line of their duty, and for their acts wilfully done while so engaged the company is liable. *Ib.*
6. *Contributory Negligence.*—Where a person walked upon the track of a railroad, knowing that it was time for a train going in the same direction, and looked back several times, but did not see the train or hear any signal, though he thought he heard it come to the point from which he started, and he could have seen the train for nearly a quarter of a mile, but did not observe it until it struck him, and he was injured thereby, and those in charge of the train, on observing that said person was heedless of the approaching danger, made the usual efforts to stop the train and avoid running upon him;
Held, that he could not recover for the injury. *Ib.*
7. *Same.—Walking on Track.*—It cannot be required of persons managing a locomotive and train of cars, that they shall stop the train whenever any one is seen upon the track, especially at points where many persons are passing and crossing the track. They have a right to presume that persons walking along or across the track will not remain until an approaching train is upon them. *Ib.*
8. *Animal Killed.—Receiver.—Service of Process.*—A railroad company is liable to an action, under the statute, for killing stock while the road is being run, operated, and controlled by a receiver appointed by the circuit court of the United States; and service of process in such case upon a conductor of a train passing through the county where the animal was killed is sufficient, though the conductor be employed and controlled by such receiver. *The L. N. A. & C. R. R. Co. v. Cauble*, 277
9. *Right to Discriminate as to Rates of Fare.*—Railroad companies may discriminate between the amount of fare where a ticket is purchased and where the fare is paid upon the train. *The I. P. & C. R. W. Co. v. Rinard*, 293.
10. *Same.*—Railroad companies have no right to discriminate between persons, and sell tickets to some and refuse others. *Ib.*
11. *Same.*—A person having duly applied for a ticket, and having been refused without just cause, has the same right to be carried upon paying, or offering to pay, the ticket rate of fare as if he had previously purchased a ticket. *Ib.*

REAL PROPERTY, ACTION TO RECOVER.

See TENANTS IN COMMON; JENKINS *v. RATCLIFFE*, 437.

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RECEIVER

See RAILROAD, 8.

Appointment of.—A judge has no power to appoint a receiver during vacation, nor has a clerk any power to approve a receiver's bond in vacation.

Newman v. Hammond, 119

RECORD.

See BILL OF EXCEPTIONS; INSTRUCTIONS TO JURY, 3, 4, 10, 11; NUNC PRO TUNC; PRACTICE, 1; SUPREME COURT, 7.

1. *Trespass.*—*Pleadings in Former Action.*—*Entry of Clerk.*—In an action for trespass upon the real estate of the plaintiff, the pleadings, entries, and judgment in a former action of the plaintiff against one of the defendants, to recover possession of the real estate, where the judgment was for the defendant, but the entry of judgment contained a statement that the ground upon which the judgment was rendered was, that the defendant was the tenant of the plaintiff and had received no notice to quit, were inadmissible as evidence for the plaintiff to show that he was the owner of the real estate.

Sharkey et al. v. Evans, Adm'r, 412

2. *Former Action.*—*Issue in Former Action, how Determined.*—What was in issue in a former action must be determined from the pleadings; and when the issues were tried by the court, in the absence of a special finding by the court, a mere statement in the entry made by the clerk can not be regarded as showing on what particular ground the finding and judgment proceeded.

B.

REFORMATION OF INSTRUMENT.

See DELIVERY BOND.

REMAINDER.

See CONVEYANCE, 1 to 9.

RES ADJUDICATA.

See EXECUTION, 4; RECORD, 1, 2.

REVIEW OF JUDGMENT.

See JUDGMENT AND DECREE.

SET-OFF.

See PLEADING, 5, 8.

SHERIFF.

See CONSTITUTIONAL LAW, 5, 6; TRUST AND TRUSTEE.

SHELLEY'S CASE.

See CONVEYANCE, 4.

SOLDIER.

See WILL, 1, 2, 3.

SPECIFIC PERFORMANCE.

Uncertainty in Contract.—Parol Evidence.—Suit by A. and B. against C. and D. for specific performance of the following contract:

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“**MESSRS. A. AND B.—Gents.**—We will give you our woollen mills, with all the appurtenances thereunto, situated in the north-west corner of public square in the town of Franklin, Indiana, for six hundred and forty acres of land in Anderson county, Kansas, one thousand dollars cash, five hundred dollars in six months, without interest; each party to pay the taxes on their property for 1870.

“Franklin, April 7th, 1871.

C. & D.”

“We accept the above proposition.

A. & B.”

Held, that parol evidence was inadmissible in such case, first, to describe the real estate, and then to apply the description.

Held, also, that evidence offered to show that the premises of C. & D. were not in the public square in the town of Franklin, nor adjoining it, would contradict the writing, and would be inadmissible.

Held, also, that there being no description of the land in Anderson county, Kansas, nor any mode agreed upon by which the lands intended could be identified, parol evidence to show what land was intended, or to permit A. and B. to select what lands they pleased, would be to make a new and different contract for the parties.

Held, also, that the contract was too vague and uncertain as to the description of the property proposed to be exchanged to be aided and the property identified by parol evidence.

Baldwin et al. v. Kerlin et al., 426.

STATUTE OF FRAUDS.

See LICENSE, 3.

1. *Sale of Growing Trees*.—A contract for the sale of growing trees is a contract for the sale of an interest in land, and must be in writing, in order to render it binding on either party.

Owens v. Lewis, 488

2. *Same*.—Growing trees are a part of the real estate, and are in the possession of the owner of the real estate until they are severed, and no delivery of the trees to another can take place, short of transferring an interest in the real estate.

Ib.

STATUTE OF LIMITATIONS.

Contract.—Personal Injury.—A complaint charging that the defendants, in consideration of a certain sum paid them, as surgeons, undertook to attend to, care for, and heal a broken arm of the plaintiff, and that they so negligently and unskillfully conducted themselves that the arm was rendered worthless, etc., is a complaint upon the contract, and the action is not barred by the statutory limitation of two years for injury to the person, but the statutory limitation of six years is applicable.

Staley v. Jameson et al., 159.

STREET.

See CITY ; FRAUD, I.

Adverse Possession.—Easements.—The rights of the public in a street of a city cannot be impaired or destroyed by the inclosure and occupancy thereof, by fencing, by an adjoining land-owner claiming title thereto.

Brooks v. Riding, 159.

SUPERIOR COURT.

1. *Assignment of Error*.—An appeal from a special term to the general term of a superior court, so far as the assignment of error is concerned, is governed by the same rules that govern in appeals from the circuit courts to the Supreme Court.

Bartholomew v. Preston, 286

2. *New Trial*.—To repeat the reasons contained in a motion for a new trial as assignments of error, without assigning the overruling of the motion for a new trial as error, presents no question for review.

Ib.

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SUPREME COURT.

See CONSTITUTIONAL LAW, 1, 2; INSTRUCTIONS TO JURY, 12.

Assignment of Error. See FISHER v. ALLISON, 592.

Evidence. See COOPER v. THE STATE, 379.

Notice to Parties. See BUTLER v. HOLTZEMAN, 523.

1. *Conflicting Evidence.*—The Supreme Court will not reverse a judgment on the weight of evidence, where the evidence is conflicting.
Rogers v. Rogers et ux., 1
2. *Admission of Evidence.*—Where no ground of objection to evidence admitted has been pointed out to the court below, no question as to the admission of evidence can be considered by the Supreme Court.
The U. C. L. Ins. Co. et al. v. Thomas, 44
3. *Evidence.*—Where the evidence in the lower court is conflicting, the Supreme Court will not reverse the judgment on the weight of evidence.
Moyer v. Brown, 55
4. *Same.*—Where evidence is conflicting, but preponderates in favor of the finding below, the Supreme Court will not disturb the finding.
Bush v. Bush, 70
5. *Same.*—Where the evidence is conflicting, the Supreme Court will not reverse a judgment on the weight of evidence.
Hill et al. v. Marsh et al., 218
6. *Same.—Failure to Except.*—An objection to the admissibility of evidence cannot be made for the first time in the Supreme Court. If admitted on the trial in the court below without objection, it must be held to have been admitted by the consent of the party affected by it.
Reid et al. v. Hawkins, 222
7. *Record.—Nunc pro tunc Entry.*—Where by a *nunc pro tunc* entry in the court below, certified to the Supreme Court on a *certiorari*, it is shown that an error appearing in the record originally sent up was not in fact committed, the record stands as though such error had never appeared.
Kellenberger v. Perrin et al., 282
8. *Demurrer.*—If a demurrer to a pleading is not in the record, no question can be decided with reference to the overruling of a demurrer to the pleading.
Derrick v. McGlone et al., 291
9. *Assignment of Errors.*—That a verdict is contrary to law, that it is not supported by sufficient evidence, or that it is excessive in amount, is good cause for a new trial, but is not a proper assignment of error. An assignment of error that the court below erred in overruling a motion for a new trial brings all those matters before the appellate court, if they were embraced in the motion for a new trial.
Shore v. Taylor, 345
10. *Conflict in Testimony.*—Where there is a direct and irreconcilable conflict in the testimony, the weight of the evidence is for the jury, and the Supreme Court will not disturb the verdict.
Good et ux. v. Combs et al., 424
11. *Clerical Mistake.*—A mere clerical mistake, being amendable in the court below, will, in the Supreme Court, be regarded as amended.
Sinton et al. v. The Steamboat R. R. Roberts, 476
12. *Joint Demurrer.—Assignment of Error.*—Where a joint demurrer of several defendants to a complaint, good as to a part of the defendants, is overruled, and judgment is rendered on demurrer for the plaintiff, and there is no separate assignment of error as to the sufficiency of the complaint, no question is presented for review as to the right of the plaintiff to recover against all the defendants.
Owen et al. v. Cooper, 524
13. *Assignment of Errors.—Title of Action.—Township Trustee.*—In an action against a township trustee, upon a note executed by him as township trus-

tee, a judgment was rendered against the township. Upon appeal to the Supreme Court, the entitling of the cause in the assignment of errors embraced the names of both the township and trustee as appellants, but the body of the assignment named the trustee only as complaining of error.

Held, that the assignment of errors was not by the township, but by the trustee. *Held*, also, that there was no judgment against the trustee from which he could appeal; and the appeal was dismissed on motion.

McIlwaine, Trust., v. Adams et al., 580

24. *Evidence*.—When evidence is excluded, the exclusion may be sustained on the ground assumed in the court below, or on any other valid ground.

Fisher et al. v. Allison et ux., 593

SURPRISE.

See NEW TRIAL, 4.

TAX.

See INJUNCTION, 4.

TENANTS IN COMMON.

See PARTITION.

Action for Possession.—One tenant in common may maintain an action for the possession of his part of the real estate, where there is a denial of his right by his co-tenants or some act amounting to such denial.

Bethell v. McCool et al., 303

TENDER.

See INJUNCTION, 9.

United States Treasury Notes.—Legal tender treasury notes of the United States were offered in payment of a judgment rendered in 1858.

Held, that the tender was good, and that the judgment plaintiff could not refuse the treasury notes and demand payment in coin. *Bowen et al. v. Clark*, 405

TIME.

See TURNPIKE, 5.

TOWN.

License to Sell Intoxicating Liquor.—Where a town in good faith adopted an ordinance requiring a license to be obtained for the retail of intoxicating liquors, in pursuance of the mandatory act of the legislature, of the 11th of March, 1867 (Acts 1867, p. 220), a person who applied for license, and received and paid for the same without objection, cannot recover back the money thus paid, although the act of the legislature, and the ordinance of the town thereunder, are invalid. *The Town of Ligonier v. Ackerman*, 552

TOWN PLAT.

See VENDOR AND PURCHASER.

Reservation for Public Square.—A statement at the foot of a town plat that certain real estate contained therein is reserved for a public square does not indicate an intention to part with the property, but rather the opposite.

Scantlin et al. v. Garvin et al., 262

TOWNSHIP.

Corporation.—By the statute, townships are corporations.

McIlwaine, Trust., v. Adams et al., 580

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TOWNSHIP TRUSTEE.

See OFFICE AND OFFICER, I; SUPREME COURT, 13.

TRESPASS.

See LICENSE, I; PLEADING, 16; RECORD, I.

TRUST AND TRUSTEE.

Parties.—*Decedents' Estates.*—Pending an attachment proceeding, in which certain goods had been seized and were held by the sheriff, an order of court was made by consent of all the parties interested, that the sheriff should sell said goods, and that he might sell on a credit, taking the notes of purchasers, with approved security. On making sales, the sheriff took notes payable to himself individually, and before the termination of the suit he died. *Held,* that the sheriff held the notes as a trustee; that he had no interest in them that could pass to his administrators, and that the latter, not being the parties in interest, could not maintain an action on a note so given.

Pratt et al. v. Carr et al., Adm'r's, 67

TURNPIKE.

1. *Organization of Company.*—*Subscription of Stock.*—It is not essential to the organization of a turnpike company, under the statute, that the whole amount of the capital stock as fixed by the articles of association shall be subscribed; it is sufficient if the stock subscribed amounts to five hundred dollars per mile of the proposed road. *Fox v. The Allensville, etc., Co., 31*
2. *Residence of Stockholders.*—It is not a valid objection to the organization of a turnpike company, that the residence of a few of the subscribers of stock to the articles of association is not stated, where the residence of a sufficient number, whose subscriptions amount to five hundred dollars per mile of the proposed road, is stated. *Ib.*
3. *Pleading.*—*Board of Directors.*—*Election of.*—Under the statute requiring that "not less than three nor more than seven directors shall be elected by the stockholders" of a turnpike company, it is sufficient to aver, in a complaint on the subscription of stock, the fact that a board of directors was elected by the stockholders, without alleging the mode of election. *Ib.*
4. *Same.*—*Notice.*—In an action by a turnpike company on the subscription of stock, though the giving of notice of the call for the payment of subscriptions is necessary before the action is commenced, and the giving of such notice must be averred in the complaint, yet the notice is not the foundation of the action and need not be made part of the complaint by copy. *Ib.*
5. *Same.*—*Time.*—*Publication of Notice.*—Where notice of the time and place of payment of stock subscriptions to a turnpike company is required by statute to be given for thirty days by publication in a newspaper, it is sufficient, in an action on the subscription, to allege that such notice was given on the second day of March for payment to be made on the first day of April. *Ib.*
6. *Representations by Stock Solicitor.*—It is no defence to an action on a subscription of stock to a turnpike company, that the person soliciting the defendant's subscription, appointed by those who had already subscribed and who afterward became members of the company upon its organization, represented that the road would be constructed in a certain manner, which has not been done. *Ib.*
7. *Evidence.*—*Calls.*—*Payment.*—The entry in the record book of the board of directors of a turnpike company signed by the secretary is competent evidence of the act of the board requiring payment from subscribers to the capital stock; and although such entry may not specify any time when the payment shall be made, yet if it direct a call to be made for the payment and notice thereof to be published, the payment is thereby required as soon as notice specifying the time of payment can be given. *Ib.*

- 8. Assessment of Omitted Lands.**—Assessors appointed under the act of 1867 to make assessments for the construction of a turnpike may correct an assessment by adding or including omitted lands.
Hopkins et al. v. The Greensburg, etc., Co. et al., 187
- 9. Same.**—An objection to such corrected assessment, that it is a full list of all the lands, and not of the omitted lands only, is not valid. *Ib.*
- 10. Same.—Assessment Corrected After Construction of Road.**—An assessment of benefits for the construction of a turnpike can be corrected and collected after the road has been completed or partly completed. *Ib.*
- 11. Same.**—Whether such assessment is collected to construct the road, or to pay a debt created for its construction, can make no substantial difference to those who are to pay the assessments. *Ib.*
- 12. Action to Enjoin Collection of Assessment.**—In an action to enjoin the collection of a turnpike assessment, it is no ground for objecting to the assessment, that the lands of persons other than the plaintiffs are incorrectly described. *Ib.*
- 13. Same.—Pleading.—Departure.**—In an action to enjoin the collection of assessments for the construction of a turnpike, on the ground that lands liable to assessment have been omitted, if an answer is filed setting up a corrected assessment, it is a departure to reply that lands of the plaintiff and other lands within the taxing limits are improperly described. *Ib.*
- 14. Names of Owners of Lands.**—It is proper to give the names of the owners in the list of lands assessed for the construction of a turnpike, but the statute does not require it. *Ib.*

UNITED STATES COURTS.

See WATER CRAFTS, I.

UNITED STATES TREASURY NOTES.

See TENDER.

VARIANCE.

Malicious Trespass.—Where a party was indicted for malicious trespass in injuring a toll-gate charged to be the property of “The Madison, Smyrna, and Graham Gravel Road Company,” and the evidence showed that the gate injured belonged to “The Madison, Smyrna, and Graham Turnpike or Gravel Road Company,” and that there was but one corporation answering to either name, and that had the latter name, the variance was immaterial.

Lowe et al. v. The State, 305

VENDOR AND PURCHASER.

See FRAUD, I.

Conveyance.—Condition Subsequent.—Town Plat.—County-Seat.—Public Square.—The original plan of the plat of the town of Evansville was made in 1817, and at the bottom of the plat it was stated in writing that a certain block, through which two streets passed, “is reserved for a public square.” Afterward, in 1818, the owners of the real estate thus platted proposed to the commissioners appointed to locate and fix the seat of justice for Vanderburgh county, that if they would fix the same in the town of Evansville, and have the square, designated on the plat as the public square, located as the square for the seat of justice, on which the public buildings should be erected, they would give as a donation, to and for the use of said county, said public square, together with other real estate, and convey the same, on the terms aforesaid, to such person as might be author-

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ized to receive a conveyance; which proposition was accepted by said commissioners, and the seat of justice was established on said public square, and the jail and court-house were erected thereon in 1818. Afterward, in 1819, the owners of the real estate thus platted conveyed to the agent for Vanderburgh county, for the use of Vanderburgh county, one-half of the public square thus designated on the plat, the deed of conveyance containing no conditions whatever. Afterward, in 1852, the Board of Commissioners of Vanderburgh County made an order directing the county agent to sell a part of said square, being a part upon which was located the jail, and in pursuance of such order the same was sold and conveyed.

Held, that the title of Vanderburgh county to the real estate was absolute, and free from any condition subsequent that it should be used for the erection of the public buildings of the county, and for no other purpose.

Held, also, that a corrected plat made ten years after the deed was made to the county agent could have no effect upon the title.

Scanlin et al. v. Garvin et al., 262

VENUE.

See JURISDICTION, 9; PRACTICE, 13, 14.

WAIVER.

See CRIMINAL LAW, 2, 3, 31; JURISDICTION, 9; PARTIES, 2; PRACTICE, 7.

WARRANTY.

See CONTRACT, 5; PLEADING, 7.

WATER CRAFTS.

1. *Jurisdiction.—Courts of the United States.—Admiralty.*—The admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel, for work done and materials furnished in its construction. *Sinton et al. v. The Steamboat R. R. Roberts*, 476
2. *Same.—State Courts.*—The courts of this State possess full and ample jurisdiction of a cause of action resting upon a debt arising out of the building of a steamboat in Indiana, under a contract made in Indiana. *Ib.*
3. *Attachment.—Lien upon Steamboat.—Surrender of Note.*—In a proceeding by attachment, to enforce a lien against a steamboat, under the statute of this State, for the price of an engine and boiler used in its construction, it is not necessary that the complaint should contain an offer to surrender a note given for the same. The taking of such note does not destroy the lien. Nor does the assignment of such note destroy the lien. The assignment carries with it the lien. *Ib.*
4. *Same.—Delay in Enforcing Lien.*—Where a debt has been incurred in building a steamboat, and the boat has left the State and been absent about nine years, the lien in such case is not lost by delay. A lien in such case is not lost unless there has been unreasonable neglect and delay, operating to the prejudice of third parties, after opportunities have existed to enforce the lien. *Ib.*
5. *Same.—Pleading.*—If a complaint to enforce such lien does not show that there has been unreasonable delay, if such fact exist, it must be shown by answer. *Ib.*
6. *Same.—Notice of Lien.—Registry Laws.*—Such lien may be enforced though no notice of the lien has been given as required by the registry laws of the United States. *Ib.*
7. *Same.—Lien Created by Master.*—The statute of this State provides a lien for liabilities created by the master of a steamboat. *Ib.*

WAY.

1. *Constitutional Law.—Private Way.*—The law for the establishment of private ways, for the benefit of one man over the lands of another, is unconstitutional.
Stewart v. Hartman et al., 331
2. *Private Way.—Public Highway.*—If a way is petitioned for and damages assessed as for a private way, and the order of the board of commissioners made for a private way, the way cannot be sustained on the ground that it is a public highway.
Ib.
3. *Way of Necessity.*—A way of necessity derives its origin from a grant, and cannot legally exist where neither the party claiming the way nor the owner of the land over which it is claimed, or any one under whom they or either of them claim, was ever seized of both tracts of land.
Ib.
4. *Estoppel.—Private Way.*—The receipt of damages assessed in proceedings before county commissioners for the opening of a private way will not estop the person receiving the same from resisting the opening of the way over his lands, where the money is accepted under a mistake as to the amount of work that will be done in opening the way by the person for whose benefit it is proposed to be opened.
Ib.

WIDOW.

See DESCENT.

WILL.

1. *Nuncupative Will.*—Nuncupative wills are to be restricted to cases falling clearly within the reason of the statute.
Pierce et al. v. Pierce, 86
2. *Same.—Soldier.*—A person who had enrolled himself in a volunteer company, raised under a call by the Governor for troops in 1862, but had not been accepted and mustered into the service, could not make a nuncupative will as a soldier.
Ib.
3. *Same.*—Real estate cannot be devised by the nuncupative will of a soldier.
Ib.
4. *Election to take Real Estate or Money.*—A. made his will, giving to his two daughters eight thousand dollars each, which they or either of them might take in real estate not disposed of by will, at its fair value, or they might decline to take the same or any part thereof in real estate; if not taken in real estate, to be paid in money; and if necessary, in order to pay the same, the executor to sell real estate and pay the same; the said daughters to enjoy the use of the money bequeathed to each "during their natural lives and at their death to revert and descend to the heirs of their body."

Held, that the devisees were required to make an election whether they would take real estate or money, and the legacies were not payable in money until they declined to take real estate.

Held, also, that the title to the undevised real estate vested upon the death of the testator in his heirs at law, and the executor had no power to convey to the devisees the real estate by them or either of them selected.

Held, also, that a commissioner should be appointed to convey the lands selected, after the same had been appraised by suitable and competent persons appointed for the purpose.

Held, also, that the devisees would hold and possess the lands selected in fee simple, and the money paid them would be theirs absolutely.

Smith, Ex'r, v. McCormick et al., 135

5. *Contest of.—Demurrer.*—Assuming, without deciding, that a party may demur to one or more of the several grounds of contest of a will, if a demurrer be joint, and any one of the grounds be good, the demurrer should be overruled.
Eiter et al. v. Armstrong et al., 197

6. *Same.—Unsound Mind.*—That a testator was of unsound mind at the time of making his will, is a good ground of contest.
Ib.

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WITNESS.

See EVIDENCE, 8.

Separation of Witnesses. See PRACTICE, 10.

Married Woman.—In an action against husband and wife, where her property interests, as well as those of the husband, are involved, she is a competent witness in her own behalf, and her testimony for herself is not to be disregarded because it may incidentally benefit her husband.

Rogers v. Rogers et ux., 1

WORDS.

“*Children.*” See CONVEYANCE, 2, 4

“*Inherit.*” See CONVEYANCE, 3.

“*Getting Intoxicated.*” See LIQUOR LAW, 2.

“*Purposely and Maliciously.*” See CRIMINAL LAW, 32.

END OF VOLUME XLVI.



